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In The
Supreme Court of the United States
October Term, 1976

No. 76-1704

W. E. CAMPBELL, SUPERINTENDENT OF PUBLIC
INSTRUCTION OF THE COMMONWEALTH OF VIRGINIA, AND
THE BOARD OF EDUCATION OF THE
COMMONWEALTH OF VIRGINIA,

Appellants,

v.

DANIEL J. KRUSE, ET AL.,

Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

PRELIMINARY STATEMENT

W. E. Campbell, Superintendent of Public Instruction of the Commonwealth of Virginia and the Board of Education of the Commonwealth of Virginia appeal from the Order and Opinion of the Three-Judge District Court for the Eastern District of Virginia entered on March 23, 1977, declaring § 22-10.8(a) of the Code of Virginia (1950), as

amended, unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution "insofar as it fails to provide an appropriate education to the plaintiffs and the class they represent," and ordering the above defendants to provide "an appropriate, private education" to the plaintiffs "commensurate with the education available to the more affluent handicapped children . . . for so long as no appropriate public education is available to them." This Court has jurisdiction over this appeal and the questions presented by this appeal are substantial.

SUMMARY OF ARGUMENT

In Virginia, as in most States, education is a local responsibility and not one of the State.

Because of the widely varying nature and severity of handicapping conditions, no public school program is able to offer special education to all individuals, nor is there a legal obligation upon either the Commonwealth or a locality to do so. It is particularly true that there is no obligation on the State. The fact that the public schools undertake some programs of special education within the public schools to meet the needs of as many of these handicapped individuals as resources permit does not create an obligation under the Fourteenth Amendment to provide a private program of special education to all handicapped individuals.

The fact that the Code of Virginia provides for a system of supplemental partial assistance grants, within the limits of the appropriation, does not create an obligation under the Fourteenth Amendment by either the Commonwealth or the local school division to provide additional funds to some handicapped individuals. In areas of economics and social welfare, it is not required that a State choose between

attacking every aspect of a problem or not attacking the problem at all.

In Virginia, the schools in each school division are under the control of the school board for that division. No local school boards were made members of a defendant class in this case. This caused the Court to award relief against the State Board of Education, as the only defendant in the case.

In the absence of any act of the Board of Education in derogation of the plaintiffs' rights, it is improper to award relief against it or to require the relief to be funded from moneys appropriated by the legislature to the Board for other purposes.

OPINION OF THE COURT BELOW

The Opinion of the District Court appears as an untitled attachment to the "Decree and Order" of the Three-Judge District Court declaring unconstitutional § 22-10.8(a) of the Code and enjoining application of the statute to the plaintiffs. The "Decree and Order" and the Opinion are not reported. The "Decree and Order" is attached hereto as Appendix 1. The Opinion is Appendix 2.

JURISDICTION

This suit was brought by the appellees in the Court below before three judges pursuant to 28 U.S.C. § 2281 seeking an order declaring unconstitutional Va. Code Ann. § 22-10.8(a), a statute of Statewide application. The Decree and Order of the District Court granting the relief requested by the appellees was entered on March 23, 1977. Notice of Appeal was filed by the appellants on March 31, 1977. The jurisdiction of this Court to review this decision by appeal is conferred by 28 U.S.C. § 1253. Jurisdiction

lies under 28 U.S.C. § 1253 because the action was filed prior to the repeal of 28 U.S.C. § 2281 on August 12, 1976 by § 7 of P.L. 94-381. Public law 94-381 now appears as a footnote to 28 U.S.C. § 2284 and provides that the repeal does not apply to actions filed prior to the effective date of the act.

STATUTES INVOLVED

Va. Code Ann. § 22-10.8(a) (1976 Cum. Supp.):

"If a school division is unable to provide appropriate special education for a handicapped child, such education is not available in a State school or institution, and the parent or guardian of any such child pays or becomes obligated to pay for his attendance at a private nonsectarian school for the handicapped approved by the Board of Education, the school board of such division shall pay the parent or guardian of such child for each school year three fourths of the tuition cost for each child enrolled in a special school for handicapped children; provided that the school board shall not be obligated to pay more than twelve hundred fifty dollars to the parent or guardian of each such child attending a nonresidential school nor to pay to the parent or guardian of each child attending a residential school more than five thousand dollars. The school board, from its own funds, is authorized to pay to the parent or guardian such additional tuition as it may deem appropriate. Of the total payment, the local school board shall be reimbursed sixty per centum from State funds as are appropriated for this purpose, which amount shall not exceed seven hundred fifty dollars for a handicapped child in a nonresidential school nor three thousand dollars for a handicapped child in a residential school; provided, however, that the local school board is not required to provide such aid if matching State funds are not available. In the event

State funds are not available, the local school board shall pay the parent or guardian tuition costs of such child in an amount equal to the actual per pupil cost of operation in the average daily membership for the school year immediately preceding, and such school board shall be entitled to count such pupils and receive reimbursement from the basic school aid fund in the same manner as if the child were attending the public schools. Payment by a local school board pursuant to this subsection to a parent or guardian who is obligated to pay for a child's attendance at a private nonsectarian school for the handicapped shall be by a check jointly payable to such school and to such parent or guardian. Payment by a local school board pursuant to this subsection to reimburse a parent or guardian who has paid for a child's attendance at a private nonsectarian school for the handicapped shall be by check payable to the parent or guardian."

QUESTIONS PRESENTED

1. Should A State, Upon Enactment Of A Tuition Assistance Program, Which Provides Grants Of Up To \$5,000 To Enable Handicapped Pupils For Whom No Appropriate Public School Program Is Available To Attend Private Schools For The Handicapped, Thereby Become Obligated To Pay All Costs In Excess Of The Grant Limits For Those Pupils Who Lack The Financial Resources To Pay Excess Costs?
2. Did The Court Err In Ordering The State Defendants To Provide The Requested Funding?
3. Are I... Is Entitled To Supplemental Funding By The State Board Of Education Under The Rehabilitation Act Of 1973 Or The Education Of All Handicapped Act Of 1975?
4. Did The Court Err In Its Finding That § 22-10.8(a) Discriminated Against The Plaintiff Class?

STATEMENT OF THE CASE

On December 3, 1975, the appellees filed a complaint requesting that a three-judge court be convened pursuant to 28 U.S.C. § 2281 to declare § 22-10.8(a) of the Virginia Code unconstitutional and to enjoin the appellants to provide the full costs of special education for the handicapped to those persons who, having no appropriate program offered to them by the schools of their locality, were unable to pay the difference between the amount of the special education tuition assistance grants offered by the State and the full cost of tuition charged by private schools. Plaintiffs did not challenge the wording of the statute, but challenged the fact that the statute did not go further and provide for additional funding based on the ability-to-pay of the applicant.

The District Court entered the Decree and Order here appealed from on March 23, 1977, and awarded judgment to the appellees finding the statute in question unconstitutional,

"... as violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution insofar as it fails to provide an appropriate education to the plaintiffs and the class they represent while all other handicapped school children in the State receive a publicly supported and appropriate education, including those handicapped children whose parents have the financial resources to avail themselves of the tuition reimbursement grants available pursuant to § 22-10.8(a)." (App. 1.)

The Order further declared that the appellants are obligated, pursuant to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, "to provide an appropriate, private education to plaintiffs and

the class they represent commensurate with the education available to the more affluent handicapped children pursuant to § 22-10.8(a), Virginia Code of 1950, as amended, for so long as no appropriate public education is available to them." (App. 1.) The reference to the education "available to" other children under the grant program is to the education in a private program and not any State-provided education.

In the action below, two county school systems were also named as defendants, although, significantly, they were not sued as class representatives. These were the Counties of Fairfax and Henrico, both of which had special education tuition programs which provided benefits in excess of those mandated by § 22-10.8(a). The Court did not criticize the programs offered by these two counties and awarded no relief against them other than that they must obey any orders of the State Board of Education pursuant to the Decree and Order herein. These counties have not appealed. Plaintiffs expressly declined to seek certification of a class of defendants.

Also named as defendants were the Virginia Department of Welfare and the welfare departments of Henrico and Fairfax Counties. Plaintiffs alleged that some localities had taken custody of children, in violation of State law, for purposes of funding private special education. At the pre-trial conference, the State welfare defendants conceded that any such practices which existed were improper and, with the consent of the Court and the plaintiffs, took steps to assure the cessation of the practices. The State Department of Welfare's instructions to the localities were incorporated as paragraph 10 of the Decree and Order. None of the welfare defendants has appealed.

The appellant W. E. Campbell, as Superintendent of Public Instruction, is the chief executive officer of the State

Department of Education. The other appellants are the members of the State Board of Education. The appellants are charged with administering the Commonwealth's program of special education for the handicapped as set forth in Chapter 1.1 of Title 22 of the Code of Virginia. As provided in § 22-10.5,¹ each school division of the Commonwealth is obligated to provide special education for the handicapped children within its jurisdiction in accordance with a program prescribed by the Board of Education pursuant to § 22-10.4.² Section 22-10.8(a) 10 is an integral part of the Chapter and places a limitation on the authority of the State to mandate full funding without paying for it.

¹ This section provides as follows:

"Each school division shall provide special education for the handicapped children within its jurisdiction in accordance with rules and regulations of the Board of Education. Each school division shall submit annually to the Board of Education by such date as the Board shall specify a plan acceptable to the Board for such education for the year following and a report indicating the extent to which the plan required by law for the preceding year has been implemented.

"The plan approved by the Board for the ensuing year shall include estimated costs of the program and shall show the obligation for local expenditure and the obligation to be borne by the State.

"If the approved plan requires the local division to increase expenditures for supplies or personnel, the same shall be included in the estimated cost and the State shall share in these costs in the ratio not less than used in the distribution of basic State aid."

² This section provides as follows:

"The Board of Education shall prepare and place in operation a program of special education designed to educate and train handicapped children between the ages of two and twenty-one and may prepare and place in operation such program for such individuals of other ages. In the development of such program, the Board of Education shall assist and cooperate with local school boards in the several school divisions and shall cooperate with the Commission for the Visually Handicapped and the Virginia Council for the Deaf."

The statute limits the authority of the Board of Education to require special education plans consistent with the levels of funding available and provides that if the approved plan requires the local school division to increase expenditures the State shall share in these costs. The ability of the State to share in these costs is restricted by the biennial appropriations made by the General Assembly.

The appellees are named plaintiffs and a class of plaintiffs who are unable to afford the difference between the tuition assistance available from the State and whatever tuition may be charged by private schools for which the appellees desire admission.

THE QUESTIONS ARE SUBSTANTIAL

I.

Should A State, Upon Enactment Of A Tuition Assistance Program, Which Provides Grants Of Up To \$5,000 To Enable Handicapped Pupils For Whom No Appropriate Public School Program Is Available To Attend Private Schools For The Handicapped, Thereby Become Obligated To Pay All Costs In Excess Of The Grant Limits For Those Pupils Who Lack The Financial Resources To Pay Excess Costs?

Virginia law does not require that a local school division provide a program of special education adequate to meet the needs of any child.³ It is also uncontroverted that the failure of the public schools to offer a program suitable to the needs of every handicapped individual is due to the extremely diverse nature of handicapping conditions, and

³ This point was conceded by the plaintiffs in the action below. Plaintiffs consented to an Order dismissing their original allegation that this was required by the Constitution of Virginia.

not to discrimination against the handicapped.⁴ The result is that uniquely complex decisions must be made as to how to achieve the best educational program for all the pupils, consistent with the limited resources available.

The public schools do not discriminate on the basis of wealth in determining those programs it will offer for the handicapped. Rather, the programs which are offered are offered to all eligible children without regard to wealth. Children who are handicapped and for whose handicap no program of special education is available in the public schools have available to them various alternative State and local programs, including the tuition grant offered pursuant to § 22-10.8(a) of the Code. In a given case, it is possible that a grant may be inadequate to cover the full amount of the tuition charged by the private school. In a case of individual need, social service agencies may provide assistance under a variety of welfare programs which were not at issue in this case. This case dealt with a hypothetical situation in which a child could not qualify for public assistance and lacked access to private philanthropy. Although none of the named plaintiffs were shown to be such a person, the Court ordered the State Board of Education to provide any additional funds which might be needed.

The key language in the Decree and Order herein is:

"... Although the challenged tuition law does not have any declared purposes, it is apparent that its principal intent is to provide an appropriate education to handicapped children who are not accommodated

⁴ Section 22-10.3(a) defines the handicapped as follows:

" 'Handicapped children' includes all children in the Commonwealth between the ages of two and twenty-one years who are mentally retarded, physically handicapped, emotionally disturbed, learning disabled, speech impaired, hearing impaired, visually impaired, multiple handicapped or otherwise handicapped as defined by the Board of Education."

within the public school system. The effect of the tuition grant system, however, is to totally exclude children whose parents are without resources to supplement the grants. Such a result is not rationally related to either the state's interest in providing education to the handicapped or to its interest in preserving its financial resources, since the grant is fully available to those whose economic need is less, and unavailable as a practical matter to those whose economic need is greatest." (App. 13.)

The Court's logic is patently faulty in two essential aspects. In fact, the interpretation given the statute was the only interpretation which could raise a constitutional problem. The logic is faulty in two ways:

(1) The Court's ruling depends on a finding that the statute is in some way a vehicle for providing education to all of the people who cannot be educated in the public schools. Rather, the true purpose is to provide tuition *assistance* to enable people to attend a private school who would otherwise not have the opportunity. There is certainly a rational relationship to that.

(2) The Opinion of the Court finds that because the tuition grant fails to provide for tuition costs in excess of the grant that it is incumbent upon the State Board of Education to pay that excess.

It is wrong to call the Virginia legislation discriminatory. Nowhere have the plaintiffs contended in any way that the Virginia legislation derives from any intentional discrimination directed against any group. It is uncontroverted that the private school programs are significantly different from the programs of basic general education offered in the public schools. The expenses of private tuition vary greatly with the nature and severity of the handicap, and the costs of a private placement may run as high as \$30,000 or

\$50,000 per year for one individual. Even persons of considerable means may lack the resources to finance such costs. Yet, the Court is telling the State Department of Education that because the statute offers assistance, the Department must provide full funding to those who need it in order to utilize the assistance. As is always the case, the poor may be less able to utilize the grants, just as they are less able to obtain any commodity or service which requires the expenditure of personal financial resources. But in this case, the service being offered is a service of private entities, who set their own prices, and the inability of a person to meet such charges results from any number of factors—none of which result from any action of the State Board of Education.

The District Court grounded its finding of discrimination on dicta in a footnote in *Rodriguez v. San Antonio Indep. Sch. Dist.*, 411 U.S. 1, 25 at n. 60 (1973), which noted that it would be questionable for a public school to charge tuition as a precondition to access to a required educational program. (App. 12.) Here the tuition is not charged by the public school, but is charged by a private school where costs are unregulated by the public school program. This is significantly different from the hypothetical in *Rodriguez*, which involved a failure to provide *any* public education to the poor. The facts of the instant case involve a public school program for all who qualify, plus a grant for those for whom an *appropriate* public school program is lacking.

When Virginia enacted its legislation providing the scope and type of special education programs, it also mandated some State and local aid for private placements in schools for the handicapped. Localities are authorized to exceed those limits. Implicit in the legislation are numerous policy decisions: (1) the decision to develop public school programs as rapidly as possible rather than relying more heavily

on the private sector, (2) allocation of resources in favor of public schools as opposed to institutions, (3) allocation of resources to teacher development and research as opposed to focusing more heavily on the instructional component, (4) difficult determinations in the allocation of resources between general education and special education.

While implementing its program of special education, the Commonwealth also determined to establish the tuition grant program which was challenged below. In 1976, the challenged program enabled some 2,400 pupils to attend private school programs which presumably met the needs of those pupils better than those of the public schools which they had been attending.

The decision of the Court below does not attempt to determine whether a crash diversion of potentially huge sums of moneys to the class members would be actually consistent with the development of the best educational program. Virginia is already too committed to provision of a quality program of special education to discontinue its grant program because of the Court's ruling. (The Order and Decree only directs the appellant to provide additional funding based on ability to pay.) Yet, because the decision of the Three-Judge Court concludes that a social benefit program is unconstitutional if it makes a flat grant irrespective of need, there is a clear indication that governments should not undertake a program of assistance unless prepared to offer fully-funded grants as well.

In making its ruling, the Court ignored the well-established rule of law that "a state does not deny equal protection merely by making the same grant to persons of varying economic need." See *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 518 (1937); *Jefferson v. Hackney*, 406 U.S. 535 (1972). This principle has been recognized more recently in *Dandridge v. Williams*, 397 U.S. 471 (1970),

and in *Rodriguez v. San Antonio Indep. Sch. Dist.*, 411 U.S. 1 (1973). *Dandridge* involved a challenge to a State system of welfare grants based on a percentage of need. In upholding the State's discretion to allocate its resources among competing needs, the Court observed:

"... the Equal Protection Clause does not require that a state must choose between attacking every aspect of a problem or not attacking the problem at all.' In the area of economics and social welfare a state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Dandridge v. Williams*, 397 U.S. at 485."

The Virginia statutes make available a grant of up to \$5,000 to a parent who pays one-quarter of that plus costs in excess of that. (App. 7.) Under *Dandridge* the State is clearly allowed to place a ceiling on the amount of the grant, but the District Court made no effort to differentiate between the perceived obligation to fund the parental contribution and the funding of tuition in excess of the grant limits.

In *Rodriguez*, *supra*, this Court recognized in a public school finance case that there is no constitutionally-mandated right to education and that an allocation of school funds which favored wealthier school districts over poorer ones was not constitutionally infirm. The Court noted that "education, perhaps even more than welfare assistance, presents a myriad of 'intractable economic, social, and even philosophical problems.' " *Id.* 411 U.S. at 42. Obviously, education is one of the most important of government functions, but there is no federally-mandated constitutional obligation in this regard. *Id.* 411 U.S. at 35.

These arguments were well stated in *New York Ass'n of Retarded Children v. Rockefeller*, 357 F.Supp. 752, 764 (E.D. N.Y. 1973):

"New York has a complicated statutory framework for providing education to the children of the state—both normal and handicapped. The level and quality of education provided to the mentally retarded does not approach what the plaintiffs assert is necessary. To meet the varying demands, New York must allocate finite resources among many worthwhile and necessary programs. It has done so in a rational manner. Having recognized a need, there is no constitutional duty to supply the need in full. *Dandridge v. Williams*, *supra*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491.

"The allocation of state resources among conflicting needs is a matter for the state legislature, if there is a rational basis and other constitutional rights are not violated. *Jefferson v. Hackney*, 406 U.S. 535, 92 S.Ct. 1724, 32 L.Ed.2d 285 (1972); *Fullington v. Shea*, 320 F.Supp. 500 (D.Colo. 1970), *aff'd.*, 404 U.S. 963, 92 S.Ct. 345, 30 L.Ed.2d 282 (1971).

"Plaintiff's constitutional rights must rest on protection from harm and not on a right to treatment or habilitation."

In accord is *Cuyahoga County Ass'n for Retarded Children v. Essex*, 411 F.Supp. 46 (N.D. Ohio 1976) (three-judge court). In fact, the decision of the District Court in the instant case is the only case since *Rodriguez* which has been heard on the merits that resulted in a judgment for the plaintiffs. This is in flat contradiction of the Court's finding that there is a viable body of case law in support of its ruling. (App. 10.)

This Court recently dismissed for lack of a federal question an appeal from the New York Court of Appeals decision which held that there was no denial of equal protection in requiring the parents of some handicapped children to

contribute to the maintenance of their children in private institutions while the parents of deaf and blind students were not required to contribute. *Levy v. New York*, 38 N.Y.2d 653, 382, N.Y.S.2d 13, 345 N.E.2d 556 (Ct. App. 1976), *appeal dismissed*, U.S., 97 S.Ct. 39 (1976). The New York Court of Appeals held:

"It would be unthinkable, however, to suggest that confronted with economic strictures State government is powerless to move forward in the fields of education and social welfare with anything less than totally comprehensive programs. Such a contention would suggest that the only alternative open to the Legislature in the exercise of its policy-making responsibility, if it were to conclude that wholly free education could not be provided for all handicapped children, would be to withdraw the benefits now conferred on blind and deaf children—thus to fall back to an undifferentiated and senseless but categorically neat policy that since all could not be benefited, none would be.

"As the Supreme Court of the United States has written in an associated context: 'The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. *Tigner v. Texas*, 310 U.S. 141, 60 S.Ct. 879, 84 L.Ed. 1124. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. *Semler v. Dental Examiners*, 294 U.S. 608, 55 S.Ct. 570, 79 L.Ed. 1086. The legislature may select one phase of one field and apply a remedy there, neglecting the others. *A. F. of L. v. American Sash Co.*, 335 U.S. 538, 69 S.Ct. 258, 93 L.Ed. 222. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.' (*Williamson v. Lee Opt. Co.*, 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563.)" 38 N.Y.2d at 661, 382 N.Y.S.2d at 17, 345 N.E.2d at 560.

II.

Did The Court Err In Ordering The State Defendants To Provide The Requested Funding?

A. IS ANY RESPONSIBILITY FOR PROVISION OF EDUCATION A LOCAL ONE?

Assuming that there is a right to a fully-funded special education under federal law, there is still a question as to whether it must be provided at the State level.

The case was brought by a class of plaintiffs against the State Board of Education and two local school boards. Plaintiffs declined the Court's suggestion to amend the Complaint to name a defendant class consisting of local boards of education. In effect, the suit was framed so as to permit relief only against the State Board of Education, or none at all. The District Court improperly took this gambit.

The obligation of the Commonwealth is set forth in § 22-10.8(a) of the Code which specifically recognizes that a school division may not be able to provide appropriate special education for all children. The Three-Judge Court erred in taking the general mandate of § 22-1.1 that the "Commonwealth" will establish a free public school system for "all" children, and construing it in such a way as to suggest that there is a mandate upon the State Board of Education to provide special education. To the extent that there is any obligation, it is an obligation of the locality. This is specifically stated in § 22-10.5, *supra*, n. 1.

It is settled law in Virginia that,

"The power to operate, maintain and supervise public schools in Virginia is, and always has been, within the exclusive jurisdiction of the local school boards and not within the jurisdiction of the State Board of Education." *Bradley v. School Board of City of Richmond*, 462 F.2d 1058, 1067 (4th Cir. 1972), (aff'd by equally

divided court), 412 U.S. 92 (1973), citing *Griffin v. School Board of Prince Edward County*, 377 U.S. 218 (1964); *County School Board of Prince Edward County v. Griffin*, 204 Va. 650, 133 S.E.2d 565 (1963).

B. DO ESTABLISHED PRINCIPLES OF FEDERALISM PRECLUDE THE RELIEF GRANTED BELOW COMPELLING THE DISBURSEMENT OF UNAPPROPRIATED FUNDS FROM THE STATE TREASURY TO THE PLAINTIFFS?

In awarding relief against the State Board of Education the Court's action violates the principle that relief is only awarded against those who violate the law.

In *Rizzo v. Goode*, 423 U.S. 362 (1976), this Court reversed the lower court orders compelling city officials who had no personal duty to the plaintiffs to implement internal procedures within the police department relating to the handling of citizen complaints against police officers. The District Court had ordered the Mayor to prevent certain policemen from harassing citizens. In rejecting the concept that a federal court had such powers to order such broad relief, this Court enunciated the sound principles of federalism that serve to limit the injunctive power of the federal courts over those in charge of state and local governmental agencies, as follows:

"Thus the principles of federalism which play such an important part in governing the relationship between federal courts and state governments, though initially expounded and perhaps entitled to their greatest weight in cases where it was sought to enjoin a criminal prosecution in progress, have not been limited either to that situation or indeed to a criminal proceeding itself. *We think these principles likewise have applicability where injunctive relief is sought not against the judicial branch of the state government, but against those in charge of an executive branch of an agency of state or*

local governments such as respondents here. Indeed, in the recent case of *Mayor v. Educational Equality League*, 415 U.S. 605 (1974), in which private individuals sought injunctive relief against the Mayor of Philadelphia, we expressly noted the existence of such considerations, saying '[t]here are also delicate issues of federal-state relationships underlying this case.' *Id.*, at 615." 423 U.S. at 380. (Emphasis added.)

The situation at issue here is identical to that in *Rizzo*. Any constitutional injury suffered by the plaintiff occurs because the locality fails to provide an educational program, not because the State Board of Education contributes to a tuition grant.

Although relief is awarded ultimately only against the State Department of Education, the Opinion seems to indicate an awareness of the locality's responsibility because it allows the State to order localities to pay, if an appropriate enforcement mechanism is guaranteed by the State. This is precisely what *Rizzo* was about. If the State Board of Education is not obligated to pay, then it should not be subject to a judgment.

If the concept of federalism is to have any meaning, it must mean that a federal court cannot award relief against State officials merely because they are the only defendants in the case. In this case, the State Board of Education is directed to evaluate each handicapped child, determine whether special education is "appropriate," and then determine what special education is "commensurate" with that offered the nonhandicapped, and then find a private school to provide the education, and pay for it. This seems to exceed the bounds of relief which a court may award.

C. IS THE FINANCIAL RELIEF ORDERED BELOW, COMPELLING THE DISBURSEMENT OF UNAPPROPRIATED FUNDS FROM THE STATE TREASURY, PRECLUDED BY THE TENTH AMENDMENT AS INTERPRETED BY THIS COURT?

Recently this Court held, in *National League of Cities v. Usery*, 426 U.S. 833 (1976), that the power of the Congress under the Commerce Clause did not, because of the Tenth Amendment, extend to imposing minimum wage requirements on the states and their political subdivisions. In reaching that result, this Court noted the financial impact of such requirement on state governments and concluded its opinion with the following:

"... Congress may not exercise that power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made. We agree that such assertions of power if unchecked, would indeed, as Mr. Justice Douglas cautioned in his dissent in *Wirtz*, allow 'the National Government [to] devour the essentials of state sovereignty,' 392 U.S., at 205, 88 S.Ct., at 2028, and would therefore transgress the bounds of the authority granted Congress under the Commerce Clause. While there are obvious differences between the schools and hospitals involved in *Wirtz*, and the fire and police departments affected here, each provides an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens. We are therefore persuaded that *Wirtz* must be overruled." 426 U.S. at 855.

If Congress cannot mandate that a state pay a minimum wage, it should be equally true that the federal courts should not be allocating a state's educational programmatic priorities. In the specially concurring opinion of Judge Barrett in *Keyes v. School District No. 1*, 521 F.2d 465, 490 (10th

Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976), the following applicable language appears:

"... No one would contend that the federal judiciary is the body to allocate available state funds to the integrative objectives of the school systems in such a manner that it will decide the priority and amount of remaining funds for other necessary and proper state governmental functions. The Tenth Amendment did reserve to the people of the various sovereign states those powers not otherwise expressly delegated to the Federal Government."

Here, the Tenth Amendment is also a limitation on the power of a federal court to force its choice upon a state in such an integral governmental function as education, including the appropriation of finite state tax dollars among competing demands from all levels of public education and the myriad of other governmental programs and services financed with state legislative appropriations.

D. IS THE FINANCIAL RELIEF ORDERED BELOW, COMPELLING THE DISBURSEMENT OF UNAPPROPRIATED FUNDS FROM THE STATE TREASURY, PRECLUDED BY THE ELEVENTH AMENDMENT AS INTERPRETED BY THIS COURT?

While the Decree and Order of the Three-Judge Court is couched in terms of finding the statute unconstitutional "insofar as it" fails to provide special education, this is really to say that the statute itself contains no infirmity. The Court did not enjoin the implementation of § 22-10.8(a). It said that in addition to contributing its share to the grant, the State has to pay anything the parents cannot. What the Court actually strikes at is the perceived unconstitutional lack of a State-level program of special education. This brings the Opinion of the Three-Judge Court squarely within the rule of *Edelman v. Jordan*, 415 U.S. 651 (1974).

In *Edelman v. Jordan*, 415 U.S. 651, 663 (1974), this Court noted that "... the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. . . ." Here, the lower court orders at issue directly compel the payment of additional unappropriated funds from the State Treasury. Thus, under the precedents of this Court, the financial relief granted below should be reversed.⁸

This Court, in *Great Northern Life Insurance Co. v. Read, Insurance Commissioner*, 322 U.S. 47 (1944), dismissed, for lack of jurisdiction, a suit to recover taxes paid to the State of Oklahoma. In doing so, the Court observed that "... when we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found." 322 U.S. at 54. In the instant cause, the lower courts have clearly invaded "the sovereign exemption from judicial interference in the vital field of education administration" by compelling the payment of additional unappropriated funds from the State Treasury.

Here, as in *Rodriguez, supra*, we have a system of financing special education based upon a combination of local property tax revenues and legislative appropriations of State

⁸ Here, unlike *Ex Parte Young*, 209 U.S. 123 (1908), the relief is not directed to enjoining a State officer from enforcing an unconstitutional statute. There has been no ruling in this case that any Virginia statute dealing with the financing of public schools is unconstitutional. *Worcester County Trust Company v. Riley*, 302 U.S. 292, 300 (1937). Also, unlike *Fitzpatrick v. Bitzer*, _____ U.S. _____; 96 S.Ct. 2666 (1976), here there is no congressional legislation authorizing the federal courts to grant relief compelling the payment of additional, unappropriated funds from the State Treasury for court-ordered educational program expansion.

school aid. In Virginia, the State aid statute is designed to encourage and reward local tax effort for public education. Further, Virginia's statewide system of financing public education will be disrupted, contrary to the decision of this Court in *Rodriguez, supra*. The Decree and Order gives the State only the option of taking money from one educational priority and assigning it to special education tuition payments.

III.

Are Plaintiffs Entitled To Supplemental Funding By The State Board Of Education Under The Rehabilitation Act Of 1973 Or The Education Of All Handicapped Act Of 1975?

At the present time, the nation is moving toward a policy of providing a "free and appropriate public education for the handicapped." This national policy is one which enjoys wide popular support. The terms of the policy are specified by statute. This case raises no issue as to this policy.

The Education of All Handicapped Act of 1975, P.L. 94-142, which amended the Education of the Handicapped Act, 20 U.S.C. § 1401, *et seq.*, mandates full funding of private placements at *no cost* to parents beginning in September of 1978. Failure to comply with P.L. 94-142 may result in the termination of federal funds under a number of programs for education of the handicapped. 20 U.S.C.A. § 1416.⁹ Thus, the Decree and Order of the Court is in error when it describes P.L. 94-142 as merely a funding vehicle for federal assistance to the handicapped.

⁹ 20 U.S.C.A. § 1416 provides for cutoff of funds provided under programs listed in 20 U.S.C.A. § 1413(a)(2), which section in turn lists the affected programs and describes them as including "any other Federal program . . . under which there is specific authority for the provision of assistance for the education of handicapped children. . . ."

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, amended the Vocational Rehabilitation Act to provide as follows:

"No otherwise qualified handicapped individual in the United States as defined in section 706(6) shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."⁷

The penalty for violation includes loss of all federal funds for the affected program.

While it is true that the legislative history does envision that otherwise qualified individuals may not be excluded from federally-assisted educational programs, there is no suggestion anywhere that the failure to offer such a program requires that the locality (and especially the State) pay the cost of a private program.

HEW will soon issue regulations implementing § 504, and at this writing it is anticipated that if the regulations incorporate the free and appropriate public education language of P.L. 94-142, they will also incorporate the September, 1978 grace period. Thus, it would appear that resolution of this case need not implicate HEW's unpublished regulations.

The Three-Judge Court apparently based its decision on

⁷ "(6) The term 'handicapped individual' means any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to subchapters I and III of this chapter. For the purposes of subchapters IV and V of this chapter, such term means any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment." 29 U.S.C. § 706(6).

the Fourteenth Amendment rather than on any statute. Paragraphs 1 and 2 of the Decree and Order specifically state the ground of decision to be constitutional. Neither § 504 nor P.L. 94-142 presently require the State to provide funding above current levels.

To interpret § 504 as requiring the State to provide full funding to those who lack the ability to pay is to distort the meaning of the statute. (If § 504 requires a school division to provide a program of special education for all, then ability to pay should have nothing to do with it.) By its terms, it applies only to persons *otherwise* qualified who are denied access to an educational program *solely* on the basis of handicap. As this Court noted in *General Electric Co. v. Gilbert*, _____ U.S. _____, 97 S.Ct. 401 (1976), there is no need to interpret this language more broadly than in the traditional sense. 97 S.Ct. at 413. The traditional meaning is that a person cannot be denied access to an existing program because of a handicap; but there is no obligation to create a program for a handicapped person.

IV.

Did The Court Err In Its Finding That § 22-10.8(a) Discriminated Against The Plaintiff Class?

This issue is significant because it bears on both the constitutional and statutory claims.

The test of whether there is unlawful discrimination is that of *General Electric Company v. Gilbert*, *supra*, *Geduldig v. Aiello*, 417 U.S. 484 (1974), and *Washington v. Davis*, 426 U.S. 229 (1976). In *Geduldig*, the failure of a State disability plan to include pregnancy was held to be "discrimination" under the Constitution. 417 U.S. 494. In *Gilbert*, the Court construed discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, as follows:

"When Congress makes it unlawful for an employer to 'discriminate . . . on the basis of . . . sex . . . ' without further explanation of its meaning, we should not readily infer that it meant something different than what the concept of discrimination has traditionally meant." 97 S.Ct. at 413.

CONCLUSION

The Decree and Order entered below compels payment of unappropriated funds from the State Treasury for Court-ordered educational program expansion "forthwith." This threatens to disrupt the legal, political and fiscal integrity of Virginia's educational appropriation for this fiscal biennium.

Wherefore, appellants respectfully request that this Court note probable jurisdiction and reverse the Decree and Order of the Court below.

Respectfully submitted,

W. E. CAMPBELL, ET AL.

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CERTIFICATE OF SERVICE

I, Walter H. Ryland, Assistant Attorney General, a member of the Bar of the Supreme Court of the United States and counsel for the Superintendent of Public Instruction and the members of the State Board of Education of the Commonwealth of Virginia, in the above matter, hereby certify that three copies of this Jurisdictional Statement have been served upon each counsel of record for the parties herein by mailing same, first-class postage prepaid, this the 31st day of May, 1977, as follows:

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All persons required to be served have been served.

/s/ WALTER H. RYLAND
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APPENDIX

APPENDIX 1

* * *

DECREE AND ORDER

Pursuant to the Opinion of the Court, filed herewith, it is hereby

(1) DECLARED that Section 22-10.8(a) of the Virginia Code of 1950 (as amended) is unconstitutional as violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution insofar as it fails to provide an appropriate education to the plaintiffs and the class they represent while all other handicapped school children in the state receive a publicly supported and appropriate education, including those handicapped children whose parents have the financial resources to avail themselves of the tuition reimbursement grants available pursuant to Section 22-10.8(a); and it is further

(2) DECLARED that the defendants are obligated, pursuant to the equal protection clause of the Fourteenth Amendment to the United States Constitution, to provide an appropriate, private education to plaintiffs and the class they represent commensurate with the education available to the more affluent handicapped children pursuant to Section 22-10.8(a), Va. Code of 1950 (as amended), for so long as no appropriate public education is available to them.

(3) DECLARED that the placement or acceptance of children within the plaintiff class in foster care, under the legal custody of a local department of social services or public welfare, for the purpose of providing state financial assistance to enable such children to attend needed private schools is illegal and unconstitutional as violative of the right to family integrity, as guaranteed by the Ninth and

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Fourteenth Amendments to the United States Constitution, and it is further

(4) DECLARED that the legal custody of any children so placed in foster care should be returned to the status quo as it existed prior to their placement in welfare custody; provided, however, that this declaration shall not affect the custody of any such child if the agency holding custody now proves, in a court of appropriate jurisdiction, a lawful basis for retaining custody, independent of the earlier relinquishment, such as parental neglect, abuse or unfitness; and it is

(5) ORDERED that defendant Campbell and the defendant members of the State Board of Education shall provide, or direct the provision of an appropriate private education to the plaintiffs and the class they represent, commensurate with the education available to the more affluent handicapped children pursuant to Section 22-10.8(a) of the Va. Code of 1950 (as amended), for so long as no appropriate public education is available to them; and it is further

(6) ORDERED that defendant Campbell and the defendant members of the State Board of Education shall file, within thirty (30) days of this date, a proposed plan consistent with the declarations of this decree; and it is further

(7) ORDERED that such plan may provide for either state or local funding, or a combination of the two, but if defendants elect to utilize local funding, such proposed plan shall include enforcement procedures adequate to insure full and timely compliance on the local level and provisions to provide for state funding in the event that local compliance is delayed; and it is further

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(8) ORDERED that this injunction shall not otherwise affect existing state statutes and regulations dealing with the definitions of handicapping conditions, and the standards and procedures for determining eligibility for tuition grants to attend private schools; provided, however, should the defendants wish to alter or amend any existing regulation or other administrative policy or rules which would affect or restrict the eligibility of the plaintiff class for tuition grants to attend private schools, such alterations or amendments shall be submitted to the Court for approval, prior to promulgation and, if possible, together with the proposed plan required by this Decree, and it is further

(9) ORDERED that plaintiffs shall file a response to the defendants' proposed plan within fifteen (15) days after service of the plan; and it is further

(10) ORDERED that defendant Lukhard and the defendant members of the State Board of Welfare shall:

(a) as to any member of the plaintiff class who was placed, by entrustment agreement, in the legal custody of a local department of public welfare or social services for the purpose of enabling him or her to attend a private school, shall forthwith direct that all local welfare departments return the legal custody of such children to their parents or other custodians who held legal custody immediately prior to the local department's assumption of custody within a reasonable period not in excess of sixty (60) days from this date, and

(b) as to any member of the plaintiff class who was placed, by court order, in the legal custody of a local department of public welfare or social services for the purpose of enabling him or her to attend a private school, shall forthwith direct that all local welfare departments having legal custody of such children (i) file, within a reasonable

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period not in excess of sixty (60) days from this date, a petition in a court of appropriate jurisdiction on behalf of such children requesting that their legal custody be returned to their parents or other custodians who held custody immediately prior to the local department's assumption of custody, and (ii) thereafter seek a timely adjudication upon such petition; provided, however, that where a local department desires to retain custody of a child covered by this paragraph for reasons unrelated to the provision of funds to enable a child to attend a private school, compliance with this injunction will be satisfied (i) if the local department files, within a reasonable period not in excess of sixty (60) days, a petition with a court of appropriate jurisdiction seeking a retention of custody upon a lawful basis independent of the department's earlier assumption of custody, such as abuse, neglect or parental unfitness, and (ii) if the forum court thereafter sustains the department's petition; and it is further

(11) ORDERED that the Henrico and Fairfax County defendants shall comply with all directives issued by the state defendants pursuant to this Decree; and it is further

(12) ORDERED that this action shall be retained on the docket for the purpose of supervising the implementation of this Decree.

/s/ John D. Butzner, Jr.
United States Circuit Judge

/s/ Robert M. Merhige, Jr.
United States District Judge

/s/ D. Dortch Warriner
United States District Judge

March 23, 1977

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APPENDIX 2

* * *

OPINION OF THE COURT

Merhige, J.

The instant case is a class action for declaratory and injunctive relief challenging the provisions of Section 22-10.8(a) of the Virginia Code of 1950 (1976 Supp.), and the practice of Virginia's welfare departments, which allegedly deny to the handicapped children of poor parents the ability to obtain an appropriate education, when such is not available in the public schools, except if the parents agree to relinquish custody of their children to the welfare department, in violation of the First, Ninth and Fourteenth Amendments to the United States Constitution and in Violation of the Rehabilitation Act of 1973, 29 U.S.C. Section 794 (as amended) and the Social Security Act, 42 U.S.C. Section 601 *et seq.*

The class of plaintiffs consists of all those handicapped children in Virginia, and their parents, who are, have been, or will in the future be eligible for tuition assistance grants pursuant to Virginia Code Section 22-10.8(a) (1975 Supp.) but whose parents are unable to pay the proportional costs of an appropriate private educational placement, not covered by such tuition assistance, because of a lack of financial resources.

The defendants are the Superintendent of the Department of Education of the Commonwealth of Virginia, the members of the Board of Education of the Commonwealth of Virginia, the Division Superintendent and members of the School Board of Fairfax County, Virginia, the Division Superintendent and members of the School Board of Henrico County, Virginia, the Commissioner of the Department

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of Welfare of the Commonwealth of Virginia, the members of the Board of Welfare of the Commonwealth of Virginia, the Director of the Department of Social Services and members of the Board of Social Services of Fairfax County, Virginia, and the Director of the Department of Public Welfare and members of the Board of Public Welfare of Henrico County, Virginia.

Jurisdiction is attained pursuant to 28 U.S.C. Sections 1331 and 1343. The amount in controversy exceeds \$10,000 exclusive of costs and interests. A three-judge court has been designated as was then required by 28 U.S.C. Section 2281.

The Commonwealth of Virginia through local school boards, as regulated and partially funded by the State Board of Education, has provided a free public school system for all children between the ages of 5 and 21. Virginia Code Section 22-1.1. All normal and some "handicapped"¹ children receive a free and appropriate educational opportunity within this system.

Consistent with the regulations of the Board of Education, each local school board is required to develop an annual plan and provide a comprehensive program of "special education"² for the handicapped children within its locality. Va. Code §§ 22-10.4 and 22-10.5 (1976 Supp.).

However, there were 36,434 handicapped children in the state during the 1975-76 school year who were identified as in need of special education but who were not provided with any appropriate special education program. In contrast, during the same school year, all other children in Virginia, a total of 1,106,186, received publicly supported and appropriate educational instruction, including 80,467 handicapped children who obtained appropriate public programs and 2,426 handicapped children who obtained appropriate private programs with the aid of state tuition grants pursuant to Va. Code § 22-10.8(a). This statute provides that "[i]f a

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school division is unable to provide appropriate special education . . . [and] such education is not available in a State school or instruction" a parent or guardian is eligible to be partially reimbursed through state tuition grants for the cost of enrollment of the child in a private program.³

In order to qualify for such a grant, the child's needs and educational development must be reviewed by a local Special Education Placement Committee. The committee's recommendations are referred to the local school division superintendent who then certifies or disapproves the student's eligibility based on State Board of Education regulations. Reimbursement is made upon documentation of enrollment in a school approved by the State Board of Education.

Reimbursement is made by the local board for seventy-five percent (75%) of the tuition costs up to a maximum of \$5,000 for the costs of a residential program and \$1,250 for a non-residential program. Statutory authority is granted to local boards to exceed these maximums at their discretion but the great majority of local boards have no general policy of doing so.⁴ The State Department of Education then reimburses the local school boards for sixty percent (60%) of the amount paid parents for eligible children, up to \$3,000 for residential and \$750 for non-residential programs.

Most of the approved private schools charge tuition fees substantially greater than the required state and local share of the tuition grant. During the school year 1975-76, the average charge was \$10,345 for a residential program and \$3,513 for a non-residential program. These charges are anticipated to increase for coming school years by reason of inflation. Even where the costs of the private program fall within the maximum grant allowances, the state grants still only covered seventy-five (75%) percent of the costs. The parents of handicapped children eligible for and

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in need of these private programs are thus forced to supplement the differences between the actual school costs and the state grants. Although some parents are able to supplement the tuition grants from insurance, other governmental agencies, private charities, personal resources and the like, many lack the financial resources to do so and this may mean that the child cannot be enrolled in a private school or that he or she is subject to being withdrawn or dismissed from the school. As a consequence, these children are denied the opportunity to receive an appropriate program of special education. In contrast are those children, handicapped and non-handicapped alike, who obtain an adequate education within the public system, and the affluent handicapped who can afford to take advantage of the tuition grants.

In an attempt to fill this unfair gap in services, local departments of social services have apparently permitted the practice of accepting legal custody of handicapped children and placing them in foster care for the purpose of receiving funding which would enable those children to receive special education services in private facilities. There are at least 38 children in foster care who were taken into custody primarily for that purpose, although the exact number cannot be determined.

This class action challenges both the tuition grant system established under § 22-10.8(a) and the practice of requiring custody as a condition precedent to the receipt of full educational funding. The former is challenged as violative of equal protection, the Rehabilitation Act of 1973, 29 U.S.C. § 794, and substantive due process. Plaintiffs attack the latter as violative of the right to family integrity, equal protection, the Rehabilitation Act of 1973, and the Social Security Act, 42 U.S.C. § 625.

Plaintiffs contend that the Virginia partial tuition reimbursement system under Va. Code § 22-10.8(a) violates

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§ 504 of the Federal Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976 Supp.) in that such law requires the defendants to pay the full expenses of an appropriate education to the plaintiff class.

Section 504 provides in part as follows:

"No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Since the Virginia public school system receives substantial federal assistance, the statute's prohibitions are clearly applicable to the instant defendants.

Defendants contend, however, that the Rehabilitation Act of 1973, 29 U.S.C. § 794 was designed to prohibit discrimination in employment and vocational training, not education, and that in any event Congress did not intend § 504 to require full funding for such services to the handicapped since subsequent legislation, Pub. L. 94-142. "Education for All Handicapped Children Act of 1975" is specifically aimed at the provisions of educational services and targets September 1, 1978 as the date for full funding.

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 "constitutes the establishment of broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap." 1973 U.S. Code Cong. & Ad. News 6390. The Congressional report on the 1974 amendments to the statute, which strengthened and broadened the Act's coverage, recognized the crucial role of educational opportunity for the handicapped:

"Without adequate education, individuals with handicaps are doomed to a continued life as second class citizens. Today our country is only educating for y percent of those individuals with handicaps. Sixty percent of these individuals are receiving a substandard education." 74 U.S. Code Cong. & Ad. News 6407.

Pub. L. 94-142, the "Education for All Handicapped Act of 1975" is essentially a funding statute, designed to provide the states with federal assistance to educate the handicapped. Although that statute does not contemplate full funding until September, 1978, it in no way impairs or diminishes the present right of handicapped children to an appropriate education under § 504. The legislative history of Pub. L. 94-142 indicates that Congress intended the statute to implement or "re-enforce" the "present right" of handicapped children to an education:

"Court action and State laws throughout the Nation have made it clear that *the right of handicapped children is a present right, one which should be implemented immediately*. The Committee believes that these State laws and court orders must be implemented and that the Congress of the United States has a responsibility to assure equal protection of the laws and thus to take action to assure that handicapped children throughout the United States have available to them appropriate educational services. The Committee believes that *the provisions it has adopted in S.6 re-enforce this right to education . . .*" 1975 U.S. Code Cong. & Ad. News 1441. (emphasis added).

State eligibility for funding through Pub. L. 94-142 requires the design and implementation of a detailed "state plan," providing for the comprehensive delivery of special

education services designed to meet the unique needs of handicapped children, by September 1978. While recognizing the compelling nature of the problem presented to the Court by plaintiffs, there is no valid reason for this Court to attempt to provide a more comprehensive approach to the delivery of special education services than Congress has already accomplished through the enactment of Pub. L. 94-142. Any judicial decree would necessarily duplicate many of the implementation steps already underway by the state. To quote Judge Joiner, "this Court could do no more than act as a cheering section" for the implementation of plaintiffs' statutory entitlement to an appropriate special education. *See Harrison v. Michigan*, 350 F. Supp. 846, 848 (E.D.Mich. 1972). While Pub. L. 94-142 will in its implementation, also eliminate the equal protection difficulties of limited reimbursement schemes, we are of the view that plaintiffs are entitled to relief on their constitutional claims, and turn now to a discussion of those claims.

The fundamental constitutional question is whether the denial of full tuition under Va. Code § 22-10.8(a) (1976 Supp.) violates the right of the plaintiff class of handicapped children to the equal protection of the laws. Defendants rely on *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) for their view that there is no constitutional obligation upon the states to provide an education for the handicapped and further that the allocation of education resources which results in different services based on the relative wealth of the beneficiaries does not violate any constitutional rights.

In *Rodriguez*, the plaintiffs had attacked, as violative of equal protection, the Texas system of financing public education under which per pupil expenditures varied according to the wealth of each school district. The Court declined to review the school financing system under standards of strict

judicial scrutiny finding that there was no impermissible interference with the exercise of a fundamental right and that there was no discrimination against any suspect class.

"For these two reasons—the absence of any evidence that the financing system discriminates against any definable category of 'poor' people or that it results in the absolute deprivation of education—the disadvantaged class is not susceptible of identification in traditional terms." *Supra* at 25.

Applying the more relaxed rational relationship test, the Court found that although concededly imperfect, the Texas system was rationally related to a legitimate purpose, assuring a basic education for every child in the state while permitting significant control of each district's school at the local level. While holding that a state need not provide equal educational opportunities for all children, the Court refrained from deciding whether some minimum quantum of education for all children was constitutionally required. The Court posed a hypothetical situation in which the state imposed tuition requirements for its public schools and said this would result in "a clearly defined class of 'poor' people—definable in terms of their inability to pay the prescribed sum who would be absolutely precluded from receiving an education. That case would present a far more compelling set of circumstances for judicial assistance than the case before us today." *Supra*, n.60.

The case at hand falls squarely within the hypothetical's embrace and indeed presents just such a compelling case for judicial assistance. Here the plaintiff class consists of those handicapped who are eligible for tuition grants but whose families are financially unable to provide them with an appropriate private educational placement, and are

thus unable to avail themselves of the grants. As a consequence, these children sustain an absolute deprivation of a meaningful opportunity to enjoy the benefits of an appropriate education, while other handicapped school children in the state receive a publicly supported and appropriate education. Such a discriminatory exclusion from educational opportunity is violative of equal protection because it is irrational and fails to further any legitimate state interest. Although the challenged tuition law does not have any declared purposes, it is apparent that its principal intent is to provide an appropriate education to handicapped children who are not accommodated within the public school system. The effect of the tuition grant system, however, is to totally exclude children whose parents are without resources to supplement the grants. Such a result is not rationally related to either the state's interest in providing education to the handicapped or to its interest in preserving its financial resources, since the grant is fully available to those whose economic need is less, and unavailable as a practical matter to those who economic need is greatest.

The previous cases involving similar challenges to tuition grant systems have not resolved the equal protection issue. In *McMillan v. Board of Education*, 430 F.2d 1145 (2d Cir. 1970), the Court confronted an equal protection challenge to a \$2,000 limit on New York's tuition reimbursement system and concluded that the plaintiff's equal protection claims were substantial enough to merit review by a three-judge court. On remand, however, the district court abstained in favor of waiting for an adjudication by the state court; concluding that "it is possible—if not indeed likely—that as a matter of State law . . . will be interpreted by the New York courts so as to eliminate the constitutional question . . ." 331 F. Supp. 302, 303 (S.D.N.Y. 1971). More recently, a challenge to the Pennsylvania tuition reim-

bursment system on equal protection grounds was initiated and the district court also found plaintiff's claims to be substantial enough to convene a three-judge court. *Halderman v. Pittenger*, 391 F. Supp. 872 (E.D.Pa. 1975). Both courts were troubled by the result of such reimbursement systems which was to make the grants "fully available to those whose economic need is less" and unavailable to "those whose economic need is greatest." *Halderman, supra* at 875. *McMillan, supra* at 1149.

Other cases in which handicapped plaintiffs have asserted the right to an education have focused on violations of plaintiffs' equal protection rights vis-a-vis non-handicapped children.⁵ The instant plaintiffs contend that the defendants must provide a public supported and appropriate education to all *handicapped* children as a matter of equal protection.

While there is substantial support for this contention since Virginia has undertaken to provide a free public school system for *all* children between the ages of 5 and 21 (Va. Code § 22-1.1), we need not reach that issue, concluding that the challenged statute, Va. Code § 22-10.8(a), for other reasons, violates the equal protection guarantees under the Fourteenth Amendment.

The challenged statute, Va. Code § 22-10.8(a), is violative of the equal protection guarantees under the Fourteenth Amendment by virtue of its exclusion from a publicly supported and appropriate education of the plaintiff class of poor handicapped children, while providing the same for those handicapped children whose parents are affluent enough to take advantage of the tuition grants.

Having concluded that the tuition grant system in issue is violative of the right to equal protection under the Fourteenth Amendment to the United States Constitution, this Court need not reach the issue left open by the Supreme Court in *Rodriguez, supra*, as to whether it also violates any

due process rights the plaintiffs might have to a minimally adequate education.

The evidence discloses that in several cities and counties, local departments of social services/welfare have apparently permitted the practice of accepting legal custody of handicapped children and placing them in foster care primarily for the purpose of receiving funding which would enable those children to receive special education services in private facilities. Plaintiffs appropriately contend that such practices violate their fundamental right to family integrity. *See Alsager v. District Court of Polk County, Iowa*, 406 F. Supp. 10 (D.C. Iowa 1975). Such a practice, in effect, conditions the provision of a government service, special education, upon the relinquishment of a constitutional right. The evidence further discloses and the Court finds that while such practices have been engaged in they are contra to the policies of the State Department of Welfare and such egregious violations of the plaintiffs' rights, where they exist, must be determined on a case by case basis with the benefit of more fully developed factual records.⁶

With respect to the equal protection violation, the relief must proceed as expeditiously as reasonably appropriate. The plaintiff class of handicapped children is currently excluded from any appropriate educational opportunity by virtue of the Virginia partial tuition reimbursement system. Recognizing education as "perhaps the most important function of state and local governments"⁷ and Virginia's provision of an education to all other handicapped children, funds must be allocated equitably to the end that no child in the plaintiff class is excluded from an appropriate education. Lack of sufficient funds to finance all of the services and programs that are needed and desirable in the public school system is no justification for the resulting total exclusion of the plaintiff class from an appropriate education.

The current funding systems in operation in Henrico and Fairfax Counties are excellent examples of systems passing constitutional muster, to the extent that they make the necessary funds available for enrollment in private programs.⁸

The State Board of Education has the primary responsibility for implementation of the judgment and decree of this Court. That Board pursuant to Va. Code § 22-10.4 is specifically empowered to "prepare and place in operation a program of special education designed to educate and train handicapped children."

An appropriate order will issue.

FOOTNOTES

1. § 22-10.8. Definitions.—As used in this chapter. (a) "*Handicapped children*" includes all children in the Commonwealth between the ages of two and twenty-one years who are mentally retarded, physically handicapped, emotionally disturbed, learning disabled, speech impaired, hearing impaired, visually impaired, multiple handicapped or otherwise handicapped as defined by the Board of Education.
2. § 22-10.8. Definitions.—As used in this chapter: (b) "*Special education*" means classroom, home, hospital, institutional or other instruction to meet the needs of handicapped children, transportation, and corrective and supporting services required to assist handicapped children in taking advantage of, or responding to, educational programs and opportunities commensurate with their abilities. (1974, c.480)
3. § 22-10.8. Reimbursement of parents or guardian of handicapped children in private schools; reimbursement of local boards from State funds.—(a) If a school division is unable to provide appropriate special education for a handicapped child, such education is not available in a State school or institution, and the parent or guardian of any such child pays or becomes obligated to pay for his attendance at a private nonsectarian school for the handicapped approved by the Board of Education, the school board of such division shall pay the parent or guardian of such child for each school year three fourths of the tuition cost for such child enrolled in a special school for handicapped children; provided that the school board shall not be obligated to pay more than twelve hundred fifty dollars to the parent or guardian of each such child

attending a nonresidential school nor to pay to the parent or guardian of each child attending a residential school more than five thousand dollars. The school board, from its own funds, is authorized to pay to the parent or guardian such additional tuition as it may deem appropriate. Of the total payment, the local school board shall be reimbursed sixty per centum from State funds as are appropriated for this purpose, which amount shall not exceed seven hundred fifty dollars for a handicapped child in a non-residential school nor three thousand dollars for a handicapped child in a residential school; provided, however, that the local school board is not required to provide such aid if matching State funds are not available. In the event State funds are not available, the local school board shall pay the parent or guardian tuition costs of such child in an amount equal to the actual per pupil cost of operation in the average daily membership for the school year immediately preceding and such school board shall be entitled to count such pupils and receive reimbursement from the basic school aid fund in the same manner as if the child were attending the public schools. Payment by a local school board pursuant to this subsection to a parent or guardian who is obligated to pay for a child's attendance at a private nonsectarian school for the handicapped shall be by a check jointly payable to such school and to such parent or guardian. Payment by a local school board pursuant to this subsection to reimburse a parent or guardian who has paid for a child's attendance at a private nonsectarian school for the handicapped shall be by check payable to the parent or guardian.

4. The two local school boards named as defendants herein, however, do provide additional funding as follows:

Henrico County School Board provides additional funds up to five thousand dollars per school year on a sliding scale basis according to the parent's ability to pay. Such additional funding is apparently sufficient to cover over 95% of the tuition requests that have been made. Funding is not provided for medical treatment, psychotherapy, or medication.

The Fairfax County School Board, rather than reimbursing parents for cost involved in private placements, contracts directly with the private schools for 100% of the educational and transportation services provided to students. Expenses that are considered non-educational are those incurred for room, board, medical care and psychiatric treatment.

5. See, e.g., *Cuyahoga County Ass'n for Retarded Children v. Essex*, 411 F. Supp. 46 (N.D. Ohio 1976); *New York Ass'n for Retarded Children v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973); *Le Banks v. Spears*, 60 F.R.D. 135 (E.D.La. 1973); *Harrison v. Michigan*, 350 F. Supp. 846 (E.D.Mich. 1972); *Pennsylvania Ass'n*

for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D.Pa. 1971) and 343 F. Supp. 279 (E.D.Pa. 1972).

6. On April 7, 1976, William L. Lukhard, Commissioner, Department of Welfare, issued a clarification of foster care policy to all superintendents and directors of local departments of social services/welfare in which he advised each that interpretation of existing foster care policy governing the use of voluntary entrustments for custody of children did not include acceptance of custody of handicapped children solely for the purpose of providing special education.
7. "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the Armed Forces. It is the very foundation of good citizenship. Today, it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the State has undertaken to provide it, is a right which must be made available to all on equal terms." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).
8. See note 4, *supra*. However, such systems must provide the range of services included within the definition of "special education" as contained in Va. Code § 22-10.3(b). See note 2, *supra*.

APPENDIX 3

* * *

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that W. E. Campbell, Superintendent of Public Instruction; and Vincent J. Thomas, Preston C. Caruthers, Billy W. Frazier, Richard P. Gifford, Elizabeth G. Helm, Allix B. James, William B. Poff, Thomas R. Watkins, and Elizabeth M. Rogers, members of the State Board of Education; defendants herein in their personal and official capacities, hereby appeal to the Supreme Court of the United States from paragraphs numbered 1, 2, 5, 6, 7, 8, 9, 11 and 12 of the final Decree and Order awarding declaratory and injunctive relief against said defendants entered in this action on March 23, 1977.

This appeal is taken pursuant to Title 28, United States Code, Section 1253.

Dated: March 31, 1977.

W. E. Campbell, *et al.*,
Defendants

By: /s/ W. H. Ryland
Counsel

* * *

SEP 21 1977

MICHAEL RODAK, JR., CLERK

In The
Supreme Court of the United States

No. 76-1704

W. E. CAMPBELL, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE COMMONWEALTH OF VIRGINIA, AND THE BOARD OF EDUCATION OF THE COMMONWEALTH OF VIRGINIA,

Appellants,

v.

DANIEL J. KRUSE, ET AL.,

Appellees.

On Appeal from the United States District Court for the
Eastern District of Virginia

APPELLANTS' SUPPLEMENTAL APPENDIX TO
JURISDICTIONAL STATEMENT

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Order of The District Court Implementing The Decree And Order of March 23, 1975	1

* * *

**ORDER OF THE DISTRICT COURT DENYING
DEFENDANTS' MOTION FOR RECONSIDERATION
(Filed August 30, 1977)**

Deeming it just and proper so to do, it is hereby ADJUDGED and ORDERED that the State education defendants' motion to reconsider the Court's Decree and Order of March 23, 1977 be, and the same is hereby DENIED.

Let the Clerk send a copy of this order to all counsel of Record.

/s/ Robert R. Merhige, Jr.

United States District Judge

Date: August 30, 1977

* * *

**ORDER OF THE DISTRICT COURT IMPLEMENTING THE
DECREE AND ORDER OF MARCH 23, 1975
(Filed August 30, 1977)**

In accordance with the Decree and Order of the Court issued under date of March 23, 1977, to the end that said Decree and Order be implemented; it is ADJUDGED and ORDERED as follows:

(1) Henrico and Fairfax County education defendants, having modified the state's tuition grant system with current funding systems in operation which are not violative of the Constitution are hereby dismissed as defendants in this action; and it is further

(2) ORDERED that the defendants continue to provide the same tuition assistance as was previously provided to any member of the plaintiff class who was released from custody of the local welfare department as a result of the Court's Decree and Order under date of March 23, 1977, until

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such time as the state education defendants have implemented Pub. L. 94-142, the "Education for All Handicapped Children Act of 1975," and it is further

(3) ORDERED that applicants for tuition assistance shall apply for tuition pursuant to present policy of the Board. This policy is set forth in Chapter 1.1 of Title 22 of the Code of Virginia and the following documents, "Rules and Regulations for Tuition Assistance for the Education of Handicapped Children in Virginia Attending Approved Non-Sectarian Schools for the Handicapped," "Administrative Requirements and Guidelines for Special Education Programs," "Delivery of Services." For a person applying for a tuition grant pursuant to § 22-10.8(a) as presently written and with the present funding limitations, there shall be no change in present practice. For persons who are unable to avail themselves of the tuition reimbursement grants available pursuant to § 22-10.8(a) because of the lack of financial resources, the following changes will be made in the application procedure:

(A) The Division of Special Education will notify division superintendents to indicate to all tuition assistance applicants that if they are unable to pay either the one-quarter parental contribution or any excess tuition costs over and above the amount of the tuition grant and their failure to pay such costs would prevent the student from enrolling in a private school offering an appropriate special education, they should so indicate at the time of application.

(B) In such a case, the local school division will utilize the procedures herein (including the appeal to the hearing officer if one is sought) to ascertain (i) the amount of money which the parents will be required to pay in order to avail themselves of the tuition reimbursement grants, provided that eligibility for private placement is to be determined

App. 3

without regard to the fiscal impact of additional funding; (ii) whether the private school offers an appropriate program; (iii) whether there is any other appropriate program at less cost; and (iv) the parent must produce all financial information requested by the local school division. The local school division will assume responsibility for gathering the information needed to resolve (B) (ii) and (B) (iii).

(C) The local school division (or hearing officer) will recommend a private school which provides an appropriate program and will recommend the total costs of services to be provided by public aid. The parent will satisfy the school division that all other potential sources of funding such as private insurance and public assistance programs have been exhausted.

(D) The Superintendent of Schools will send a notice to each individual identified in the plan of that school division as not being adequately served by the public school program of the opportunity to apply for supplemental assistance under this plan.

(E) If the Division of Special Education of the State Department of Education disagrees with the amount certified by the locality, it will specify an amount believed to be proper and promptly notify the parents that they may appeal the certification to the State Board of Education or a committee thereof. The Board shall afford a due process hearing for all such appellants. Prior notice will be sent to counsel for the plaintiffs for informational purposes.

(F) If the Division of Special Education agrees with the local certification, it will provide 60% of the added expense. The locality will provide 40% of the added expense. The contribution of the State and local school division will be referred to as the Excess Tuition Supplement. It will be in addition to the amount of the tuition grant available pur-

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suant to § 22-10.8(a), other sources of funding available to the parent such as insurance and public assistance programs, and the parental contribution as hereinafter described.

(G) If any locality fails to provide its share of funding pursuant to this section, the State Board of Education is directed to withhold the sum from any appropriated monies earmarked for the locality to which the Board may have access.

(H) The parental contribution will be computed as follows. A base calculation of family income will be made, which shall consist of wages and salaries; self-employment income; dividends, interest, rents, royalties; contributions from persons not living in the home; alimony and child support. This income will be adjusted by deductions for dependents (\$750), dependents in private schools and colleges (\$750), shelter costs (rent/mortgage and utilities) above 30% of the total income; medical costs above 3% of income; medical and disability insurance premiums.

(I) For parents making an application for a nonresidential tuition program, the parental contribution will be 5% of the adjusted income; provided that no contribution will be required where the adjusted income is below \$5,000 per year.

(J) For tuition applications for residential programs, the parental contribution will be 10% of adjusted income; provided that no contribution will be required where the adjusted income is below \$5,000 per year.

(K) In addition, there is a second computation based upon income and non-income assets above \$10,000 respectively. As to income, this will include adjusted income above \$10,000 per year. Non-income assets shall be deemed to consist of the fair market value of stocks, bonds, securities, non-essential personal property, real estate equity and net

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worth of business, as well as cash, savings, and checking accounts. However, only the total amount of assets above \$10,000 shall be subject to this computation. Of this total of income and assets, 25% will also be added to the totals in (I) or (J) above to determine the family responsibility.

(L) Costs which will be included in the above calculations shall include (i) instruction appropriate to the needs of the handicapped pupil, (ii) reasonable charges for room and board, except for charges for room and board in psychiatric care institutions, and institutions accredited as hospitals by the Joint Commission on Accreditation of Hospitals where the admission to such institution or hospital is principally for the provision of psychiatric care rather than special education, (iii) related services including developmental, corrective, and other supportive services (including speech pathology and audiology, physical and occupational therapy, recreation, psychological services). Medical and psychiatric services will be provided for diagnostic purposes only. Such related services must be required to assist the handicapped child to benefit from special education; and (iv) transportation may be provided as in Section 22-10.11 of the Virginia Code. State participation in transportation costs will be limited to 60% of a maximum shared amount to be determined by the State Department of Education consistent with appropriations.

(M) Provided that parents who allege that they lack the resources to provide additional transportation costs which are necessary to avail themselves of the tuition grant may petition the locality for a determination that additional funding is needed and it is further

(4) ORDERED that this plan shall be in effect until such time as the State education defendants have implemented Pub. L. 94-142, the "Education for All Handicapped Children Act of 1975"; and it is further

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(5) ORDERED that any person or persons who has/have currently approved tuition grant but who has/have been unable to avail themselves of the tuition grant because of the lack of resources need not reapply for eligibility. However, that person or persons will have to receive a determination of the new matters described in paragraph 3 above; and it is further

(6) ORDERED that nothing herein shall be deemed to render the parent, child, State or locality ineligible for aid for which they would have been eligible in the absence of the Decree and Order herein. The obligation placed upon the State Board of Education by this plan is solely to supplement aid available from other sources in the absence of the Decree and Order herein. Nothing herein shall be construed to bar eligibility for payment of all or portions of the State or locality's share of the Excess Tuition Supplement from federal funds which would have been available in the absence of the Decree and Order herein. And it is further

(7) ADJUDGED and ORDERED that this action shall be dismissed from the docket with leave for either party to reinstate same for such purposes as may be necessary.

Let the Clerk send a copy of this order to all counsel of record.

/s/ John D. Butzner, Jr.
United States Circuit Judge

/s/ Robert R. Merhige, Jr.
United States District Judge

/s/ D. Dortch Warriner
United States District Judge

Date: August 30, 1977

IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1704

Supreme Court, U. S.
FILED
OCT 7 1977
MICHAEL RODAK, JR., CLERK

W. E. CAMPBELL, Superintendent of Public Instruction of
the Commonwealth of Virginia, and THE BOARD OF EDU-
CATION OF THE COMMONWEALTH OF VIRGINIA,

Appellants,

—v.—

DANIEL J. KRUSE, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

MOTION TO DISMISS OR AFFIRM

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IN THE
SUPREME COURT OF
THE UNITED STATES

October Term, 1976

No. 76-1704

W.E. CAMPBELL, Superintendent of
Public Instruction of the Common-
wealth of Virginia, and THE BOARD
OF EDUCATION OF THE COMMONWEALTH
OF VIRGINIA,

Appellants,

v.

DANIEL J. KRUSE, et al.,

Appellees.

On Appeal From The
United States District Court
for the
Eastern District of Virginia

MOTION TO DISMISS OR AFFIRM

Appellees, pursuant to Rules of the
Supreme Court of the United States, move
the Court to dismiss the appeal herein as
to appellant Board of Education of the
Commonwealth of Virginia on the ground that

such appellant is not a party to this case. Alternatively, appellees, pursuant to Rule 16, move that the Decree and Order of the District Court be affirmed on the grounds that the question is so unsubstantial, and the decision below so plainly correct, as not to warrant further review.

STATEMENT OF THE CASE

This is a direct appeal from the decree and order entered on March 23, 1977, by a District Court of three judges. Jurisdictional statement, App. 1-4 (hereafter J.S. App.).

Appellees¹ challenged the provisions of Virginia Code Section 22-10.8(a) and the practice of the state's welfare departments, which deny to the handicapped children of poor parents the ability to obtain an appropriate education, when such is unavailable in the public schools, except if the parents give legal custody of their children to a local welfare department.

During school year 1975-1976, there were 36,434 handicapped children in Virginia who received no appropriate program of education. Pursuant to Virginia Code Section 22-10.8(a), handicapped children are

1. Appellees are three handicapped children and their parents affected by the challenged statute and practice.

eligible for a tuition grant to attend a private school approved by the state Department of Education where no appropriate program is available in the public schools. In most cases these grants do not cover the full costs of the private schools. In fact, during 1975-76, parents were required to contribute an average of \$2,760 for a non-residential school.

Appellees and the class they represent² are handicapped children or parents of handicapped children for whom no appropriate educational program is available in the public schools. Additionally, appellees lack the financial resources to contribute to the private school tuition not covered by the tuition grants. As such, the children appellees are totally denied an opportunity to obtain a program of appropriate education. In contrast, all non-handicapped children in Virginia receive a free appropriate education within the public school system. During school year 1975-1976, approximately 80,000 handicapped children also received such an education. In addition, there were 2,426 handicapped children who were able to enroll in private schools with the assistance of state tuition grants.

2. On April 28, 1976, the lower court declared two plaintiff classes consisting of (1) those handicapped children in Virginia without appropriate public school programs and unable to supplement the tuition grants available pursuant to Virginia Code Section 22-10.8(a) and (2) the parents of such children.

In an attempt to provide handicapped and poor children with an education, local welfare departments, with funds provided through the state Department of Welfare, will pay all or enough of the tuition not covered by the state grants to enable an affected handicapped child to enroll in an appropriate private school. However, such funds are available only if parents first give legal custody of the child to the welfare department. The practice of requiring parents to relinquish custody of their children in exchange for obtaining an education is not a common one nationally.

The three judge court below declared Virginia Code Section 22-10.8(a) unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment and enjoined appellant W.E. Campbell and the defendant members of the state Board of Education to

"provide, or direct the provision of an appropriate private education to the plaintiffs and the class they represent, commensurate with the education available to the more affluent handicapped children pursuant to Section 22-10.8(a) of the Virginia Code of 1950 (as amended), for so long as no appropriate public education is available to them." J.S. App. 2.

The lower court also declared uncon-

stitutional, as violative of the right to family integrity, guaranteed by the Ninth and Fourteenth Amendments, the practice of providing full funding for a private school placement upon the condition that parents surrender legal custody of their children to a local welfare department.³ The director of the state Department of Welfare and the members of the state Board of Welfare were ordered to direct all local welfare departments to return to parents the custody of all members of the plaintiff class placed in state custody as a result of this practice.⁴

3. Contrary to the assertion of appellants, J.S. at 7, appellees did not challenge upon state law grounds the welfare departments' practice of conditioning funding upon a relinquishment of custody. Rather, appellees charged that such violated Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794, the Social Security Act, 42 U.S.C. Section 625, the equal protection clause of the Fourteenth Amendment, as well as the family integrity right upon which the lower court based its decision.

4. Contrary to appellants' assertion, J.S. at 7, this relief did not merely incorporate the partial reform instituted by state welfare officials, which did not include any specific efforts to return custody of those children placed in state care pursuant to the unconstitutional relinquishment policy.

Since the court below issued its judgment, appellants have submitted to the district court a plan detailing the steps they would take to insure appellees equal educational opportunity. The adequacy of that plan is sub judice. Additionally, since the court issued its judgment, the U.S. Department of Health, Education and Welfare issued sweeping regulations pursuant to the Rehabilitation Act of 1973, 29 U.S.C. Section 794. 42 Federal Register 22676, et seq. Because of these regulations appellees have filed a motion which is also sub judice to amend that court's judgment so as to base relief upon Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794 rather than the Fourteenth Amendment.

POINT I

THE COURT HAS NO JURISDICTION TO CONSIDER
AN APPEAL BY THE BOARD OF EDUCATION
OF THE COMMONWEALTH OF VIRGINIA.

Appellants in this appeal are W.E. Campbell, the Virginia Superintendent of Instruction, and the Board of Education of the Commonwealth of Virginia. Jurisdictional Statement, p. 1. The Board of Education, however, was not a party to this case. Only the individual members of the Board were named as defendants. Moreover, since this case is an action brought pursuant to 42 U.S.C. Section 1983, the Board of Education, a state agency, presumably could not have been named as a defendant. Monroe v. Pape, 365 U.S. 167 (1961).

Accordingly, this Court has no jurisdiction to consider the purported appeal of the Board of Education.

POINT II

THE JUDGMENT BELOW IS CLEARLY CORRECT.

A. Virginia's Scheme Is Unconstitutional.

The decision of the court below, striking down Virginia Code Section 22-10.8(a) insofar as it discriminates against the plaintiff class, is so clearly correct that further review by this Court is unwarranted.

Although upholding a state's statutory system for financing public education which results in substantial interdistrict disparities in per-pupil expenditures, this Court in San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) indicated the constitutional infirmities of a tuition grant system for public education nearly identical to that at issue here.

"If elementary and secondary education were available by the state only to those able to pay a tuition assessed against each pupil, there would be a clearly defined class of 'poor' people--definable in terms of their inability to pay the prescribed sum--who would be absolutely

precluded from receiving an education. That case would present far more compelling set of circumstances for judicial assistance than the case before us today." Id. at 25, n. 60.

The instant case involves a class of handicapped children who must pay in order to receive the appropriate education provided to all other school children in Virginia. Like the poor children in the Rodriguez hypothetical, the plaintiff class here, by definition, cannot afford the supplemental payments required in addition to the state tuition grants. Without the means to make these payments, the children cannot be enrolled in the private schools available for their appropriate education. The district court found that since the children have no appropriate public programs available to them, they "sustain an absolute deprivation of a meaningful opportunity to enjoy the benefits of an appropriate education." J.S., App. 13.

This gross discrimination against those children who are handicapped and poor lacks any rational justification. The obvious purpose of the tuition grant statute is to provide an appropriate education to those handicapped children not accommodated within the public schools. But the effect of the statute is irrationally to exclude poor and middle income children from educational opportunity pro-

vided at state expense to the more affluent. The poor never receive any state tuition assistance since they are not enrolled in private schools. The affluent are thus the only recipients of the state's largess. As stated by the court below,

"Such a result is not rationally related to either the state's interest in providing education to the handicapped or to its interest in preserving its financial resources, since the grant is fully available to those whose economic need is less, and unavailable as a practical matter to those whose economic need is greatest."
J.S. App. 13.

This Court has repeatedly held that such a discriminatory exclusion from government benefits violated equal protection. See, Jimenez v. Weinberger, 417 U.S. 628 (1974); Department of Agriculture v. Moreno, 413 U.S. 528 (1973). Appellees "stand on an equal footing" with their more affluent counterparts in their need for an education, and to "deny one subclass benefits presumptively available to the other denies the former the equal protection of the laws." Jimenez v. Weinberger, supra at 637. Moreover, state fiscal concerns cannot justify the exclusionary burden borne by these appellees alone. In James v. Strange, 407 U.S. 128 (1972), a unanimous court struck

down a state recoupment statute which denied indigent criminal defendants exemptions from execution given all other judgment debtors. While the court recognized the legitimate state interest in recouping the costs of court-appointed counsel, it held that "these interests are not thwarted by requiring more even treatment of indigent criminal defendants with other classes of debtors." Id. at 141. State fiscal concerns, therefore, "need not blight in such discriminatory fashion the hopes of indigents for self-sufficiency and self-respect." Id. at 141-142.

The judgment at issue here, like James v. Strange, merely requires appellants to provide "more even treatment" of appellees compared with the educational opportunity available to the affluent. The lower court only ordered appellants to insure that appellees and the class they represent receive "an appropriate private education... commensurate with the education available to the more affluent handicapped children pursuant to Section 22-10.8(a) of the Virginia Code of 1950 (as amended), for so long as no appropriate public education is available to them." J.S., App. 2.

This mandate is entirely consistent with cases holding that states are not generally required by equal protection to design social benefit programs in such a fashion as to fully meet the needs of all potential recipients. See, Dandridge v.

Williams, 397 U.S. 471 (1970); Jefferson v. Hackney, 406 U.S. 535 (1972); Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937). Such cases are premised upon the availability of governmental services to all classes of recipients, including the indigent, although the services may not fully meet the social needs dealt with as to all eligible classes. In Dandridge v. Williams, supra, for example, the court sustained a system of welfare grants which failed to provide to large families the proportionate level of public assistance available to smaller families. But under the system at issue in Dandridge v. Williams, the larger families challenging the distribution of public funds could in fact obtain and utilize the grants available to them.

The instant case, however, presents a completely different situation, for the appellees here are totally excluded from receiving the tuition grants obtained by the affluent. Appellees must pay money out of their own pockets in order to utilize the grants and they lack the financial means to do so. The effect is to totally exclude them from the receipt of the services gained by the affluent. Jurisdictional Statement, App. 13. Such an exclusionary system of service financing--as opposed to one which has only a proportionately negative impact upon some recipients--is violative of equal protection guarantees under the established precedents of this Court where there is no rational

justification for the discriminatory treatment.⁵ Jimenez v. Weinberger, *supra*; Department of Agriculture v. Moreno, *supra*; San Antonio Independent School District v. Rodriguez, *supra* at 25, n. 60.

The result in this case is consistent with every federal decision which concerns handicapped children. In fact, all of the cases dealing with the equal protection rights of handicapped children have agreed that their exclusion from educational benefits available to others would be unconstitutional. See, e.g., Frederick L. v. Thomas, 408 F.Supp. 832, 834-835 (E.D. Pa. 1976); In re G.H., 218 N.W.2d 441 (N. Dak. 1974); Mills v. Board of Education, 348 F. Supp. 866 (D.D.C. 1972); Harrison v. Mich-

5. Levy v. New York, 38 N.Y.2d 653, 382 N.Y.S.2d 13, 345 N.E.2d 556, appeal dismissed, ___ U.S. ___, 97 S.Ct. 39 (1976), Cuyahoga County Ass'n for Retarded Children v. Essex, 411 F.Supp. 46 (N.D. Ohio 1976) and New York Ass'n for Retarded Children v. Rockefeller, 357 F.Supp. 752 (E.D.N.Y. 1973), relied upon by appellants, involved no exclusion from educational opportunity and therefore inopposite. For example, in Levy v. New York, *supra*, the tuition grant system which was sustained required parents to contribute only such sums as they could afford, with the effect that no child was denied the opportunity to utilize the grants.

igan, 350 F.Supp. 846 (E.D. Mich. 1972). Cf., McMillan v. Board of Education, 430 F. 2d 1145 (2d Cir. 1970); Halderman v. Pittenger, 391 F.Supp. 872 (E.D. Pa. 1975); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F.Supp. 1257 (1971) and 343 F.Supp. 279 (E.D. Pa. 1972).

B. The Relief Ordered By the District Court Was Appropriate and Within Its Power.

Given this clear unconstitutional impact of Section 22-10.8(a), it was entirely within the district court's power to order the relief provided. As stated in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15 (1971) rehearing denied, 403 U.S. 912,

"If school authorities fail in their affirmative obligations..., judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."

The district court's judgment was carefully limited to remedying only the discrimination found unconstitutional and "[a]n order of this kind is within the court's power if required to assure these petitioners that their constitutional rights will no longer

be denied them." Griffin v. County School Board, 377 U.S. 218, 233-234 (1964). See also, Milliken v. Bradley, ___ U.S. ___, 45 L.W. 4873 (dec. June 28, 1977).

Appellants' argument to the contrary borders on the frivolous. They have the clear authority, under state law, to undertake the obligation imposed upon them.⁶ Virginia Code Section 22-10.4 (1976 Supp.) specifically directs the state Board of Education to "prepare and place in operation a program of special education designed to educate and train handicapped children." (Emphasis added.) See also, Virginia Code Sections 22-10.12 (1976 Supp.) 22-19, 22-21.2, 22-40 and 22-126.1.

The relief provided by the district court intrudes upon no federalism interests. Unlike Rizzo v. Goode, 423 U.S. 362 (1976), where administrative officials played no role in the sporadic acts of misconduct engaged in by individual police

6. Bradley v. School Board of City of Richmond, 462 F.2d 1058 (4th Cir. 1972), aff'd by equally divided court, 412 U.S. 92 (1973), relied upon by appellants, dealt only with appellants' authority in the area of general education, not that dealing with the handicapped. Moreover, it was decided before the enactment of the state legislation at issue here, which considerably broadened appellants' authority over the education of the handicapped.

officers, the appellants' own acts here result in the unconstitutional deprivations suffered by appellees, since they directly administer and regulate the state tuition grant system at issue. Given the clear unconstitutionality of appellants' own acts, the interests of our federal system command, rather than contravene, the necessity that their conduct be brought within constitutional norms. Swann v. Charlotte-Mecklenberg Board of Education, supra.

Appellants' argument that National League of Cities v. Usery, 426 U.S. 833 (1976), prohibits the relief provided is without merit for that case dealt only with Congress' power under the Commerce Clause to impose minimum wage requirements upon state governments. To equate Congress' Article I authority with that of a federal court, acting pursuant to inherent Article III authority and a statutory remedy enacted pursuant to Section 5 of the Fourteenth Amendment, is to ignore the basic federal structure separating governmental authority into distinct legislative, judicial and executive branches. This Court has never held that the Tenth Amendment restricts a federal court's authority to remedy unconstitutional conduct.

The Eleventh Amendment also constitutes no restriction upon the relief ordered. There is absolutely no authority holding that prospective relief necessary to curb unconstitutional conduct is barred by the Eleventh Amendment, even if there

is a consequential fiscal impact. On the contrary, since Ex Parte Young, 209 U.S. 123 (1908), this Court has never questioned on Eleventh Amendment grounds the federal judiciary's power to enjoin state officials from future unconstitutional acts. Edelman v. Jordan, 415 U.S. 651 (1974), held only that retroactive relief is beyond the authority of the federal courts if such imposes a liability upon a state's treasury. Prospective relief was not at issue in that case and the Court went to great lengths to distinguish its holding from the clear case law allowing similar prospective relief. Id. at 657-658, 664, and 666, n. 11. As this Court recently reaffirmed, federal courts are authorized "to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury." Milliken v. Bradley, supra, 45 L.W. at 4879.

POINT III

THIS CASE IS INAPPROPRIATE FOR REVIEW
BECAUSE BASED UPON UNIQUE FACTS,
THE JUDGMENT IS OF LIMITED DURATION
AND RELIEF IS NOT FINAL.

The judgment below was not based solely upon the inadequacy of the educational funding scheme operated by these appellants. Also at issue was the relinquishment policy of state welfare officials which grew out of the discriminatory impact of Virginia Code Section 22-10.8(a). The court below

found that welfare officials would provide full funding for the private education unavailable to the appellee class under the challenged statute. But such was available only if parents agreed to give custody of their children to the state. The defendant state welfare officials in stipulations admitted that this practice was without rational justification:

"The legal custody of a handicapped child should not normally be a relevant factor in the provision of special education services. The maintenance of stable parental relationships is an important factor for normal childhood development and this relationship should not normally be disrupted." Stipulations Between Plaintiffs and State Welfare Defendants, para. 9.

While this appeal does not challenge the lower court's determination that this relinquishment practice is unconstitutional, its judgment on this issue, and the facts upon which it was based, are inseparably connected to this appeal. Appellees' complaint had sought the relief at issue here, i.e. the provision of equal educational opportunity to poor, handicapped children, jointly from both appellants and the defendant welfare officials. Moreover, while these appellants did not operate the relinquishment policy of the welfare defendants, they were directly responsible

for it since the inadequacy of the tuition funding scheme they did operate forced its creation.

Given the blatant and admitted irrationality of requiring parents to give up custody of their children in order to obtain educational opportunity, it is extremely unlikely that this practice would be prevalent elsewhere. This appeal merely presents an episodic legal issue which should not recur again and which is, therefore, not of sufficient importance to merit review by this Court. Cf., Rice v. Sioux City Cemetery, 349 U.S. 70 (1955).

Moreover, any judgment rendered by this Court would have only limited impact, even for these appellants. Federal legislation requires that Virginia provide an entirely free appropriate education to the appellee class beginning in September, 1978. P.L. 94-142, Section 612(2)(B), 20 U.S.C. Section 1412(2)(B). Recent regulations promulgated by the U.S. Department of Health, Education and Welfare pursuant to the Rehabilitation Act of 1973, 29 U.S.C. Section 794 reinforce this obligation. 42 Federal Register 22676, et seq.

This legislation goes well beyond the relief ordered by the District Court, which allows appellants to exact parental contribution based upon ability to pay. Therefore, the judgment at issue will be effectively moot, beginning in September, 1978. Given the period of time likely to result

before this Court would render its decision. If jurisdiction is noted, this Court's judgment would, therefore, be largely of academic impact for the parties involved. Cf., Rice v. Sioux City Cemetery, supra.

The present posture of the case in the district court also militates against this Court's exercise of jurisdiction. The judgment of March 23, 1977 requires appellants to file a plan detailing the steps they would take to insure appellees equal educational opportunity. They have done so but the district court has not yet ruled on whether their submission is adequate to remedy the unconstitutional tuition system. Because several of appellants' points raised in this appeal deal only with the relief ordered, the district court's final ruling as to relief may materially alter the issues raised in this appeal.

Moreover, appellees have a motion pending in the district court to amend the judgment of March 23, 1977, so as to base relief upon Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794. The U.S. Department of Health, Education and Welfare recently promulgated regulations implementing this statute, which were not available to the district court when it issued its decision of March 23, 1977. 42 Federal Register 22676 (May 4, 1977). The district court's decision on the pending motion to amend its judgment may significantly affect the posture of the case by providing a non-constitutional

basis for the result obtained.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the appeal herein should be dismissed or, alternatively, that the decree and order of the District Court should be affirmed.

Respectfully submitted,

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AUG 8 1977

MICHAEL RUDAK, JR., CLERK

In The
Supreme Court of the United States

No. 76-1704

W. E. CAMPBELL, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE COMMONWEALTH OF VIRGINIA, AND THE BOARD OF EDUCATION OF THE COMMONWEALTH OF VIRGINIA,

Appellants,

v.

DANIEL J. KRUSE, ET AL.,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

APPELLANTS' SUPPLEMENTAL BRIEF AND BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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On Appeal from the United States District Court for the Eastern District of Virginia

APPELLANTS' SUPPLEMENTAL BRIEF AND BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

STATEMENT OF THE CASE

This pleading is filed because the appellees' Motion to Dismiss or Affirm raises new issues. In addition, the decisions of this Court in *Beal v. Doe*, No. 75-554, June 20, 1977, 45 L.W. 4781, and *Maher v. Roe*, No. 75-1440, June 20, 1977, 45 L.W. 4787, should be considered at this stage. Appellants

accordingly ask that this be treated as a Supplemental Brief pursuant to Rule 25(5) of the Rules of the Supreme Court.

The Statement of the Case presented by the appellee is misleading. This statement will address only those "facts" over which there is disagreement.

The record does not support appellee's statement that 36,434 pupils were denied an "appropriate" education. This is a partial quote from the stipulations (Order on Pre-trial Conference, pp. 14-28, Stipulation 11) and the stipulated exhibits (State Education Defendants' Exhibits 1-3). The entire stipulation shows that of one million school children an additional 36,000 are potentially eligible for special education services of some kind. Of these, some 26,000 are in the process of evaluation and about 10,000 are identified as pupils in the public schools who are eligible to receive special education services. These figures do not purport to represent a number of pupils being denied an education, but pertain only to an "appropriate special education" as that term is defined by Virginia law. (Order on Pre-trial Conference, pp. 14-28, Stipulation 20.)

The references in the Statement of the Case in the Motion to Dismiss or Affirm similarly distort the significance of the practice of local welfare departments' use of foster care programs to fund private special education placements. The evidence at trial showed that, without the knowledge of the State Department of Welfare, in some 38 isolated cases out of over 10,000 children in the foster care programs there had been placements, with the consent of parents and local welfare departments for purposes of obtaining special education funding. This practice was not in accord with Virginia law and the State Department of Welfare took appropriate steps to see that the practice, to the limited and unauthorized extent it existed, was discontinued. The impropriety of such placements was never a

significant issue in the lawsuit, the only issue being the extent to which the practice existed.

I.

THE VIRGINIA TUITION SUPPLEMENT IS CONSTITUTIONAL

Appellees grouped a number of arguments under this general heading which will be addressed under the following headings.

A.

The State's Tuition Grant Does Not Constitute An Exclusion From Government Benefits.

Those cases cited, on page 9 of the Motion to Dismiss or Affirm¹ for the proposition that an exclusion from government benefits may be unconstitutional, are all cases involving conditions in aid programs which were found to lack an adequate justification. The recent decision of this Court in *Matthews v. deCastro*, 425 U.S. 957 (1976), makes it clear that the propriety of an exclusion from benefits turns on a factual determination of the reasonableness of the exclusion.

However, in the case of the Virginia statute there is a sufficient basis. The Virginia statute is an aid program which provides money to assist people in obtaining educational services which in the absence of such aid might not be available to those who desire the services. It is reflective of a policy to allocate funding priorities in the development of public school programs in the public schools. An analogy may be drawn to the various other government scholarship

¹ *Jimenez v. Weinberger*, 417 U.S. 628 (1974); *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973); *James v. Strange*, 407 U.S. 128 (1972).

programs,² or to the food stamp program,³ in which the participant pays part of the cost.

Specific authority for the reasonableness, as a matter of law, for such programs exists in the decisions in *Dandridge v. Williams*, 397 U.S. 471 (1970), *Jefferson v. Hackney*, 406 U.S. 535 (1972); and *Carmichael v. Southern Coal and Coke Co.*, 301 U.S. 495 (1937), all of which expressly affirm the principle that in offering social benefit programs a failure to offer full funding is not a constitutional violation.

This Court has noted recently that the participation of a state in the Medical Assistance Program (Medicaid) under Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.*, does not require that the state fund all medical services. *Beal v. Doe*, *supra*. Similarly, in the case of abortions, financial need alone does not identify a suspect class for purposes of equal protection analysis. *Maher v. Roe*, *supra*. As in *Maher*, *supra*, the question of the extent to which special education services will be provided is one best left to the legislative branch.

The analogy between the obligations to provide educational services in this case and medical services in those cases is so close as to make the *Beal* and *Maher* decisions dispositive of this issue. Just as *Beal* and *Maher* stand for the proposition that a state, by electing to provide medical services under Medicaid, does not have to provide all medical services, so does a state by providing some programs of special education not become obligated to provide programs for all types of special education. The facts of the instant case are even stronger than those in the abortion

² See, e.g., the Basic Educational Opportunity Grants Program, 45 C.F.R. § 190, 20 U.S.C. § 1070, which awards scholarships up to a fixed amount.

³ 7 U.S.C. § 2011 *et seq.*, 7 C.F.R. part 270.

cases. Here the state program pays up to 75% of the cost of the private placement, and for those who do not utilize a tuition grant there are available numerous other programs of special education.

B.

Appellees Reliance On San Antonio Independent School District v. Rodriguez Is Inapplicable.

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), in holding that there was no constitutional right to an education, criticized the lower Court decisions relied on by appellees herein for assuming "through a simplistic process of analysis" that all education had to be funded at equal levels. *Rodriguez*, 411 U.S. at 20. In the "Motion to Dismiss or Affirm," appellees rely on a footnote in *Rodriguez*, 411 U.S. at 25, n. 60, to the effect that once a state has assumed an obligation to provide education, it could not offer it only to those who can pay tuition.

The instant case is different because under Virginia law, localities provide special education for the handicapped to the extent to which they are able to do so. There is no obligation to provide special education to everybody. The record herein shows that about 8% of Virginia's school population receive special education in the public schools, about .25% utilize tuition grants, and about 1% of those who are in the public schools are eligible for special education programs which are not offered.

Those who are eligible for special education programs are not denied a public education. They may not receive the "appropriate special education," which all schools would like to provide. But there is not one piece of evidence in this case which would even suggest that any such child is thereby denied an education within the meaning of *Rodriguez*.

The trial Court equated semantics of an "appropriate program of special education" as that term is used in Virginia law with a constitutionally required right to an appropriate education. Such should not be the law.

C.

The Relief Ordered Is Inappropriate.

At this writing, the Court has not decreed the details of any relief to be awarded. However, the Decree and Order of March 23, 1977, does direct the State Board of Education either to provide educational services or to direct localities to do so.

Appellants contended on page 8 of the Jurisdictional Statement that Sections 22-10.4 and 22-10.5 of the Code of Virginia (1950), as amended, provide a system in which the State Board of Education develops a program of special education (not necessarily one that guarantees that services will be provided for every handicap) and the local school division then implements such a program. These sections are quoted on page 8 of the Jurisdictional Statement. Section 22-10.5 of the Code of Virginia only allows the State Board to prescribe programs to the extent of appropriations.

Pursuant to Section 22-10.8(a) of the Code of Virginia there is no guarantee that even the tuition payments will be made unless sufficient sums are appropriated. Absent an appropriation, the parent who elects a private placement is entitled only to a sum equal to the annual per pupil expenditure of the school division.

Appellants thus reassert their position that the Court erred in awarding relief against the Board of Education. A reading of the relevant statutes, plus the constitution shows that the State Board of Education can neither fund addi-

tional programs absent an appropriation nor require programs for which there is no appropriation.

II.

THE CASE CONTAINS NO FACTS WHICH RENDER REVIEW INAPPROPRIATE

Since the Decree and Order of the Three-Judge Court strikes down the constitutionality of a statute, it would seem that this would merit the consideration of this Court. The decision of the Three-Judge Court effectively repeals the decisions of this Court in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), and *Dandridge v. Williams*, 397 U.S. 471 (1970). Indeed, appellees' reliance on *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1955) for authority to the contrary is misplaced. In that case the holding was that passage of an intervening state statute left no "special and important reasons" for granting a writ of certiorari as required by the Rules of Court. The instant case involves an appeal of right pursuant to 28 U.S.C. § 1253.

Similarly this case will not become moot upon the effective date of P.L. 94-142, 20 U.S.C. § 1412(2)(B). While Virginia will in all likelihood move to full funding of special education by the September 2, 1978, date specified in the law, that will be a voluntary action. The Decree and Order by its specific terms (Jurisdictional Statement, App. 2 at 11) would impose a continuing obligation to comply with that statute. The effect of the Decree and Order is (1) to order compliance with a federal statute which otherwise requires compliance only as a condition to receipt of funds, and (2) to order compliance a full year in advance of that required by the statute.

The appeal herein is timely. The decision of this Court in *San Antonio Independent School District v. Rodriguez*, 411

U.S. 1 (1973), followed the finding by the Three-Judge Court of the constitutional infirmity in the statute, even though the questions of remedy were still pending. This was apparently noted with approval, *Id.* at p. 6, n. 4.

III.

THE JURISDICTION OF THIS COURT IS UNAFFECTED BY THE STYLE OF THE CASE

Appellees contend that because this appeal was styled by naming the Board of Education of the Commonwealth of Virginia as an appellant rather than naming each individual member, this Court is ousted of jurisdiction.

The Notice of Appeal herein was filed in the names of the members of the Board of Education who had been sued in their individual and official capacities in the action below. The Notice further notes that they are the Members of the State Board of Education. The Certificate of Service on the Jurisdictional Statement refers to the fact that it is on behalf of the members of the Board.

Appellees have cited no authority for the proposition that a variance in the style of a case and the Notice of Appeal divests this Court of Jurisdiction. Appellant has found none.

Under Rule 10(4), Rules of the Supreme Court, all parties below are deemed parties on appeal. That rule indicates that this Court is not divested of jurisdiction.

It is submitted that any defect is one of form. Pleadings "are commonly to be interpreted in accordance with their true character without much regard to their name or title." 61 Am. Jur. 2d *Pleadings* § 24.

CERTIFICATE OF SERVICE

I, Walter H. Ryland, Assistant Attorney General, a member of the Bar of the Supreme Court of the United States and counsel for the Superintendent of Public Instruction and the members of the State Board of Education of the Commonwealth of Virginia, in the above matter, hereby certify that three copies of this Appellant's Supplemental Brief and Brief in Opposition to Motion to Dismiss or Affirm have been served upon each counsel of record for the parties herein by mailing same, first-class postage prepaid, this the 5th day of August, 1977, as follows:

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All persons required to be served have been served.

WALTER H. RYLAND
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JUN 30 1977

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1704

W.E. CAMPBELL, Superintendent of Public
Instruction of the Commonwealth of Virginia, and
THE BOARD OF EDUCATION OF THE
COMMONWEALTH OF VIRGINIA,
Appellants,

v.

DANIEL J. KRUSE, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT
OF VIRGINIA

**BRIEF OF PROMISE AS AMICUS CURIAE IN SUPPORT
OF THE APPELLEES' MOTION TO DISMISS THE APPEAL
OR AFFIRM THE JUDGMENT OF THE DISTRICT COURT
UNDER RULE 16**

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INTEREST OF AMICUS CURIAE PROMISE

Pursuant to Rule 42 of the Rules of the Supreme Court
of the United States, the instant Brief is filed on behalf of
PROMISE with the consent of all the parties involved in this

proceeding in this Court and before the district court. The written consents of the several parties are being filed herewith with the Clerk of this Honorable Court. In addition, by Order entered May 27, 1977, PROMISE was permitted by the district court to participate as amicus curiae in all subsequent proceedings in that court. However, the participation of PROMISE as amicus curiae in this Court is pursuant to the consent provisions of Rule 42.

The interest of PROMISE in the instant case is profound because of its role as an unincorporated Virginia association serving as a coalition of constituent groups dedicated to the achievement of equal rights for handicapped persons and the enhancement of the ability of handicapped children to achieve to the very limits of their ability. A partial listing of the constituent groups for the purpose of demonstrating the depth of interest of amicus follows.

HEAR and VOICE are, respectively, Richmond metropolitan area and statewide groups concerned with the improvement of services for hearing-impaired children. The Virginia Association for Retarded Citizens is a statewide group with 44 local affiliated groups dedicated to securing services for the retarded individual, and his family, and to creating a greater public awareness of the needs and potential of retarded persons. The Virginia Association for Children with Learning Disabilities is similarly a statewide organization with numerous local affiliates concerned with the improvement of educational services for learning disabled children. The Fairfax Association for Children with Behavior Dysfunctions is a local group seeking the enhancement of services and programs for so-called emotionally disturbed children. The Council for Exceptional Children is a statewide organization comprised

primarily of educators and other professionals involved in the delivery of special educational services, and the improvement of the skills of those involved in service delivery programs. The Virginia Division of the American Association of University Women is a statewide group with 43 branches that, in part, is dedicated "to foster the development and maintenance of high standards of education... [and] ...strengthen the fellowship among university women in order that their effect may be felt throughout the state in the solution of social and civic problems..." Other members of the PROMISE coalition were unable to be signatories to this brief but they are nonetheless equally committed to the improvement of special education services for handicapped children in Virginia.

This description of the component groups involved in PROMISE should clearly demonstrate the profound interest that PROMISE has in the instant proceedings as parents, professionals, and concerned citizens who recognize the failure of Virginia to live up to the promises made to these special children through the years, and who also believe that when any citizen is prevented from achieving his full potential, all citizens are diminished thereby.

In addition to the obvious interest of PROMISE as amicus curiae in seeking either the dismissal of this appeal or the summary affirmance of the decision of the district court, the constituent member groups involved in PROMISE and their individual members have insights into this litigation, and the laws and practices that prompted it, that are peculiar to their status as handicapped persons, the parents of handicapped children, the professional educators and others that work to remediate the handicapping conditions, and those citizens who seek the improvement of educational services for all.

PRELIMINARY STATEMENT

Amicus curiae PROMISE joins with Appellee Daniel J. Kruse, et al., in moving the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the United States District Court for the Eastern District of Virginia on the grounds that no substantial parties in interest have appealed this case and that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument or review.

JURISDICTION

Appellants assert that the jurisdiction of this Court is conferred by 28 United States Code §1253.

ISSUES PRESENTED

1. Does This Court Have Jurisdiction To Entertain An Appeal In The Names Of W.E. Campbell As Superintendent Of Public Instruction Of The Commonwealth Of Virginia And The Board Of Education Of The Commonwealth Of Virginia Where No Substantial Relief Was Granted Against Campbell And The Board of Education Was Not A Party To The Proceedings In The District Court?

2. Does This Case Present A Substantial Question Demanding Review By This Court?

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of Virginia, Article VIII, Section 1

The General Assembly shall provide for a system of free public elementary and secondary schools for all children of school age throughout the Commonwealth, and shall seek to ensure that an educational program of high quality is established and continually maintained.

Va. Code Ann. §22-10.8(a) (1976 Cum. Supp.)

"If a school division is unable to provide appropriate special education for a handicapped child, such education is not available in a State school or institution, and the parent or guardian of any such child pays or becomes obligated to pay for his attendance at a private nonsectarian school for the handicapped approved by the Board of Education, the school board of such division shall pay the parent or guardian of

such child for each school year three fourths of the tuition cost for each child enrolled in a special school for handicapped children; provided that the school board shall not be obligated to pay more than twelve hundred fifty dollars to the parent or guardian of each such child attending a nonresidential school nor to pay to the parent or guardian of each child attending a residential school more than five thousand dollars. The school board, from its own funds, is authorized to pay to the parent or guardian such additional tuition as it may deem appropriate. Of the total payment, the local school board shall be reimbursed sixty per centum from State funds as are appropriated for this purpose, which amount shall not exceed seven hundred fifty dollars for a handicapped child in a nonresidential school nor three thousand dollars for a handicapped child in a residential school; provided, however, that the local school board is not required to provide such aid if matching State funds are not available. In the event State funds are not available, the local school board shall pay the parent or guardian tuition costs of such child in an amount equal to the actual per pupil cost of operation in the average daily membership for the school year immediately preceding, and such school board shall be entitled to count such pupils and receive reimbursement from the basic school aid fund in the same manner as if the child were attending the public schools. Payment by a local school board pursuant to this subsection to a parent or guardian who is obligated to pay for a child's attendance at a private nonsectarian school for the handicapped shall be by a check jointly payable to such school and to such parent or guardian. Payment by a local school board pursuant to this subsection to reimburse a parent or guardian who has paid for a child's attendance at a private nonsectarian school for the handicapped shall be by check payable to the parent or guardian."

STATEMENT OF THE CASE

The Statement of the Case contained on pages six through nine of the Jurisdictional Statement filed by Appellants is satisfactory to amicus curiae with the exception of the following matters. That Statement refers to "two county school systems", "the Virginia Department of Welfare", and "the welfare departments of Henrico and Fairfax Counties" as parties defendant in the district court and yet the Amended Complaint that gave birth to this proceeding nowhere named these *agencies* as defendants, but rather the individual members of the various Boards and the Directors of the several agencies were named as parties, individually and in their official capacities. This is an important distinction as will be alluded to later. Second, the statement that the district court "did not criticize the program offered by these two counties" (Henrico and Fairfax) is not quite correct as the court indicated in footnote 8 to its Decree and Order that these systems must provide reimbursement for the full range of special education services as defined by state law, which they are not presently doing. Third, the Statement of the Case drafted by Appellants asserts that the plaintiffs had alleged in the Complaint that the welfare defendants "had taken custody of children, in violation of State law" and yet the correct allegation was that the practice in question was violative of federal law. Other than these discrepancies the Statement of the Case is an accurate summary of the proceedings in the district court.

ARGUMENT

I.

THIS HONORABLE COURT HAS NO JURISDICTION TO CONSIDER AN APPEAL FILED BY THE BOARD OF EDUCATION OF THE COMMONWEALTH OF VIRGINIA.

As pointed out previously, the defendants named in the Amended Complaint in this action were the individual members of the Board of Education of the Commonwealth of Virginia, and at no time was the Board itself as a separate and distinct legal entity before the district court as a party. The Amended Complaint named, among others, as parties defendant "VINCENT J. THOMAS, PRESTON C. CARUTHERS, BILLY W. FRAZIER, RICHARD P. GIFFORD, ELIZABETH G. HELM, ALLIX B. JAMES, WILLIAM B. POFF, THOMAS R. WATKINS, and ELIZABETH M. ROGERS, individually and in their official capacity as members of the Board of Education of the Commonwealth of Virginia." The Responsive Pleading filed on behalf of these defendants was captioned as follows: "ANSWER OF DEFENDANTS W.E. CAMPBELL, MEMBERS OF THE STATE BOARD OF EDUCATION, WILLIAM L. LUKHARD, AND MEMBERS OF THE STATE BOARD OF WELFARE, TO THE AMENDED COMPLAINT." Thus, it was the individual *members* of the Board that were at all times before the district court and the Decree and Order of the court consistently granted relief against "the defendant members of the State Board of Education" (See paragraphs (5) and (6) of the Decree and Order at App. 2 of the

Jurisdictional Statement).^{*} Indeed, the Amended Complaint could not have sought relief against the School Board as a legal entity under 42 United States Code §1983. *Monroe v. Pape*, 365 U.S. 167 (1961). Consequently, this Honorable Court has no jurisdiction to entertain an appeal by any of the purported Appellants except W.E. Campbell.

W.E. Campbell, Superintendent of Public Instruction of the Commonwealth of Virginia, is the chief administrative and executive officer of the Department of Education and, as such, he primarily carries out the policies established by the members of the State Board of Education and his function is largely a ministerial one. Consequently, the relief granted by the district court is not so relevant to his role as will be the policies adopted by the members of the State Board in obedience to the court's Decree and Order.

II.

THE JUDGMENT OF THE COURT BELOW IS CLEARLY CORRECT.

As quoted above, the Constitution of Virginia in Article VIII, Section 1, mandates the provision "of free public elementary and secondary schools for all children of school age throughout the Commonwealth" and the General Assembly of Virginia attempted to give flesh to these bones insofar as handicapped children were concerned by the passage of progressive and far-reaching legislation in 1972. That legislation largely was impelled by the ratification of the

^{*}Hereinafter cited as (Juris. Statement, p.).

new State Constitution and by the recommendations of a legislative study group dealing with the problems of handicapped persons which were released just prior to the 1972 session of the Virginia General Assembly. Contrary to the assertions of the Appellants in their Jurisdictional Statement, the tuition assistance portion of that legislation was not included for the ludicrous purpose that it would "enable people to attend a private school who would otherwise not have the opportunity" (Juris. Statement, p. 11). The Report of the Virginia Advisory Legislative Council on *Needs of the Handicapped* stated two rationales for the tuition assistance program embodied in the predecessor to Section 22-10.8 of the Code of Virginia. First, it was to provide children with an education appropriate to their needs where no such education was provided in the public schools, and, second, it was to "induce the rapid expansion of special education classes in local school districts" (VALC Report, pp. 5, 10). In other words, it was for the dual purposes of meeting the State's constitutional obligation to educate "all children" and also to act as an expensive inducement to the development of less expensive public programs. The intent was that no further need would exist for such a tuition assistance program after July 1, 1976, but the existence of the program would allow for a gradual and rational development of full public special education.

The inertia of the State of Virginia, the State School Board, and the General Assembly have prevented this original timetable to be implemented. The decision of the court below has brought to fruition on constitutional grounds what was legislatively intended in 1972 on policy grounds. The point of this brief legislative history is to demonstrate the fallacies apparent in some of the basic assumptions made by

Appellants in their Jurisdictional Statement filed in this Honorable Court. The superficial history also shows that the holding of the court below, rather than being an extreme departure from the mainstream of constitutional law, is consistent with the legislatively stated aims of the Commonwealth of Virginia.

The Appellants bottom their attack on the Decree and Order of the court below on its alleged inconsistency with the decision of this Honorable Court in *Rodriguez v. San Antonio Independent School District*, 411 U.S. 1 (1973). This attack ignores the distinction Your Honors made in footnote 60 of that opinion where the Court noted, as pointed out below, that:

If elementary and secondary education were made available by the State only to those able to pay a tuition assessed against each pupil, there would be a clearly defined class of "poor" people — definable in terms of their inability to pay the prescribed sum — who would be absolutely precluded from receiving an education. That case would present a far more compelling set of circumstances for judicial assistance than the case before us today (411 U.S. at 25).

The district court acknowledged that the instant case presented the very issue posited by the hypothetical situation alluded to by this Court — the essential deprivation of minimal education in the absence of an ability to pay tuition charges. The children represented by the plaintiff class fall into the category of the deprived children described by the Court just as precisely as if they were charged a tuition to attend the public schools, or if the public school education were conducted in a totally foreign tongue and the only

alternative education was one to be purchased by a tuition charge. In addition, in *Rodriguez*, this Court reluctantly acknowledged that there was no constitutional right to a public education that was federally guaranteed. Here, there is such a constitutional right guaranteed by the Virginia Constitution and the stipulation of that provision out of the case by counsel below cannot repeal it. Its efficacy remains nonetheless to provide the basic grounding of a right that must be administered in light of the equal protection clause of the Fourteenth Amendment to the United States Constitution. This is an equal protection case and amicus submits that Article VIII, Section 1, of the Virginia Constitution necessarily characterizes education as a fundamental right in Virginia.

Not only is this case an appropriate one for the application of the equal protection clause but the decision of the district court is essentially a narrow and conservative one. The court did not expansively address the broad issue of the existence of an abstract constitutional right to an appropriate education on behalf of all handicapped children, although many courts, state and federal, have previously done so without any fear and trembling. See Wald, "The Right to Education," 2 *Legal Rights of the Mentally Handicapped* 833 (B. Ennis & P. Friedman, eds. 1973); Handel, "The Role of the Advocate in Securing the Handicapped Child's Rights to an Effective Minimal Education," 36 *Ohio State L.J.* 349 (1975); Weintraub & Abeson, "Appropriate Education for All Handicapped Children: A Growing Issue," 23 *Syracuse L. Rev.* 1037 (1972); Herr, "Retarded Children and the Law: Enforcing the Constitutional Rights of the Mentally Retarded," 23 *Syracuse L. Rev.* 995 (1972); Note, "The Right to Education: A Constitutional Analysis," 44 *Cincinnati*

L. Rev. 796 (1975). The court here declined to rule so broadly but merely ruled that Section 22-10.8(a) of the Code of Virginia (1950), as amended, was constitutionally infirm under the equal protection clause "by virtue of its exclusion from a publicly supported and appropriate education of the plaintiff class of poor handicapped children, while providing the same for those handicapped children whose parents are affluent enough to take advantage of the tuition grants." (Juris. Statement, p. App. 14). This narrow scope of the district court's ruling disturbs amicus who believes a far more expansive determination to have been justified, but the very narrowness demonstrates the insubstantiality of the issues presented by the instant appeal. The decision of the district court in denying Appellant's Motion for a Stay and Renewed Motion for a Stay also points to the insubstantiality of the decision below.

The decision of the district court is an important decision because of the immediate practical effect it will have on those many children who have been denied access to appropriate educational programs for the attempted remediation of their handicapping conditions and there will undoubtedly be some substantial impact on the special education programs offered by the Commonwealth of Virginia. However, this practical importance and beneficent impact do not raise the *legal issues* involved to the level of substantiality. Congress, in enacting Public Law 94-142, acknowledged as a reality in 1975 that "court action and State laws throughout the Nation have made it clear that the right of handicapped children is a present right, one which should be implemented immediately." 1975 U.S. Code Cong. & Admin. News 1441. This is scarcely the language of a Congress entered uncharted waters with timidity. In fact, the

very enactment of Public Law 94-142 with its requirement of a full free education for handicapped children by September 1, 1978, largely renders insubstantial the decision of the court below as the impact of the Decree and Order will only be for one year, and then the rights of the children will expand.

For many long years handicapped children have been a distinctive and identifiable subculture with few articulate spokesmen other than those intimately involved in their aspirations. Despite the unfortunately narrow scope of the district court's decision, it does represent at least a halting step toward the implementation of full rights for handicapped persons. Certainly the children impacted and their parents will benefit from the decision, but in the long run it is society itself that is the successful hidden plaintiff. Because these children may well become productive members of society able to contribute to the commonweal according to their potential. There is, however, a more basic reason for the district court's decision to be left undisturbed — it is correct, it is just, it is fair. Dr. Erik Erikson, the noted child psychologist, once remarked that "the deadliest of all possible sins is the mutilation of a child's spirit." We, all of us, have unwittingly been engaged in the mutilation of these children's spirits for far too long. The district court has made a small gesture toward halting the mutilation. PROMISE would not like to have to inform their members and their children that the gesture was in vain.

CONCLUSION

Wherefore, amicus curiae PROMISE respectfully urges that the questions upon which this cause depends are so insubstantial as not to need further argument, and that the decision of the district court is so patently correct, and amicus curiae respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert E. Shepherd, Jr., counsel for amicus curiae PROMISE in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on or before the 30th day of June, 1977, I mailed three copies of this Motion to Dismiss or Affirm, first-class postage prepaid, to the following counsel of record:

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